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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ERNEST WINKLER, RAYMOND J. ASARO, FRANCIS E. BAKER, RALPH N. CAPASSO, DAVID CLEARY, GERARD F. CONDON, LAURANCE CONTI, JAMES CUMMINS, JOHN P. DEVANEY, ROBERT DORRITIE, WILLIAM J. DOVENERO, DAVID P. DRURY, BRUCE W. ERICKSON, MICHAEL FIORILLO, HERBERT C. FISCHER, THOMAS E. FLYNN, MICHAEL P. FRISCH, HENRY W. FUHRMAN, AARON GRABER, FRANK GUSTAR HENKEL, JR., STANLEY D. JESSAMINE, JR., DENNIS KEATING, KIRK A. KOWALCHUK, PETER L. LAUDATI, JOSEPH LIOTTI, PETER P. LORENZO, NEAL M. McKENNA, RICHARD J. MARUCHEAU, ARTHUR MESSINGER, JOHN J. MORAN, WILLIAM R. MURPHY, THOMAS MURRAY, WARREN A. NAGLE, JOHN OEHM, JAMES A. OPALECKY, ANTHONY ORSANO, ROBERT PESCE, KENNETH J. PISCOPO, RICHARD PLOUFF, MICHAEL REHBERG, WILLIAM H. RITCHIE, ROBERT G. SCHILDHORN, C. BENJAMIN STIVALA, ERIK WIENER, FRED C. ZERILLI, and others similarly situated,

Appellants,

vs.

JOSEPH E. SPINNATO, individually and as Commissioner of the Fire Department of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether under the equal protection or privileges and immunities clauses of the United States Constitution "spending money" within a state justifies disparate treatment between resident and non-resident civil servants, none of whom reside within the municipality in which they are required to reside under a residency law?

2. Whether the distinction which arises from residency in different states can be justified under the equal protection and privileges and immunities clauses of the United States Constitution, where there is disparate treatment between two classes of civil servants, neither of whom has complied with the duty imposed by a residency law to reside within a fixed municipality?

3. Whether a statute which confers upon civil servants who are residents at a fixed point in time the benefit of amnesty from the

penalty of dismissal from employment under a municipal residency law violates the equal protection or privileges and immunities clauses of the United States Constitution when such benefits are withheld from non-residents?

4. Whether the distinction between civil servants who violate a municipal residency law by residing outside the state and civil servants who violate the same law but reside within the state, can be justified under the equal protection or privileges and immunities clauses of the United States Constitution?

5. Whether there is a fundamental right to continued public employment after the vesting of civil service status for purposes of the privileges and immunities or equal protection clauses of the United States Constitution?

PARTIES

The parties are set forth in the caption herein. There are no corporate affiliations.

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No.

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ERNEST WINKLER, RAYMOND J. ASARO, FRANCIS E. BAKER, RALPH N. CAPASSO, DAVID CLEARY, GERARD F. CONDON, LAURANCE CONTI, JAMES CUMMINS, JOHN P. DEVANEY, ROBERT DORRITIE, WILLIAM J. DOVENERO, DAVID P. DRURY, BRUCE W. ERICKSON, MICHAEL FIORILLO, HERBERT C. FISCHER, THOMAS E. FLYNN, MICHAEL P. FRISCH, HENRY W. FUHRMAN, AARON GRABER, FRANK GUSTAR HENKEL JR., STANLEY D. JESSAMINE, JR., DENNIS KEATING, KIRK A. KOWALCHUK, PETER L. LAUDATI, JOSEPH LIOTTI, PETER P. LORENZO, NEAL M. McKENNA, RICHARD J. MARUCHEAU, ARTHUR MESSINGER, JOHN J. MORAN, WILLIAM R. MURPHY, THOMAS MURRAY, WARREN A. NAGLE, JOHN OEHM, JAMES A. OPALECKY, ANTHONY ORSANO, ROBERT PESCE, KENNETH J. PISCOPO, RICHARD PLOUFF, MICHAEL REHBERG, WILLIAM H. RITCHIE, ROBERT G. SCHILDHORN, C. BENJAMIN STIVALA, ERIK WIENER, FRED C. ZERILLI, and others similarly situated,

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Respondents.

On Appeal from the Court of Appeals
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, (hereinafter "Supreme Court") decided July 9, 1987, is set forth in the appendix p. 66-a. The opinion of the Appellate Division, Second Department (hereinafter "Appellate Division), reported at 134 A.D.2d 66, 523 N.Y.S.2d 530 (2d Dep't 1987), is set forth in the appendix p. 17-a.

The opinion of the Court of Appeals, State of New York (hereinafter "Court of Appeals"), reported at 72 N.Y.2d 402, 532 N.Y.S.2d 759, ____ N.E.2d ____ (1988) and is set forth in the appendix p. 1-a.

GROUNDS OF JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. §1257(2), this appeal drawing into question the constitutional validity of a 1986 amendment (hereinafter the "amnesty clause") of the New York State Public Officers Law, Sections 3 and 30 (hereinafter the "residency law") which allows New York City uniformed officers including firemen (hereinafter collectively referred to as "firemen") who have resided outside of the City and its six contiguous counties (hereinafter collectively the "City") in violation of the residency law, to remain in their present dwellings provided they were State residents at the time of the amendment.

Alternatively, this Court is asked to accept jurisdiction of this matter pursuant

to 28 U.S.C. §1257(3) as a petition for writ of certiorari.

The residency law requires City firemen to live within the City but enforcement has never been pursued. There is no separate residency law which permits City firemen to satisfy the residency law merely by residing within the state. In late 1985 the City changed its policy and notified employees that the residency law would henceforth be vigorously enforced. Because thousands of employees were in violation of the law, the Uniformed Fire Fighters Association (hereinafter the "UFA") promoted the amnesty clause to legalize the non-City residence of all firemen, irrespective of the state of residence. However, the final bill limited the amnesty clause coverage to state residents

(hereinafter sometimes "up-state residents").

Appellants sought to extend the amnesty clause coverage to non-residents on the ground that the distinction between residents and non-residents violated their constitutional rights to equal protection, privileges and immunities and due process.

The Supreme Court held that the rational basis to sustain the constitutional validity for distinguishing between resident and non-resident firemen was that non-residents did not have the same "loyalty, sense of accountability and identity with the state and municipality" and would not return the same "economic benefit" to the state as residents.

The Appellate Division affirmed but limited its holding to the "economic benefit" theory. The Court of Appeals

affirmed the Appellate Division on October 20, 1988, citing the grounds relied on by the State Supreme Court.

Timely notice of appeal to this Court was filed in the Court of Appeals on November 12, 1988 and in the State Supreme Court on November 10, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the effect of the amnesty clause law upon the privileges and immunities clause of Article 4, Section 2, and the equal protection, privileges and immunities and due process clauses of the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment to the United States Constitution provides, as follows:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Article 4, Section 2 provides, as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The amnesty clause, New York State Public Officers Law Sections 3 and 30 provides in pertinent part, as follows:

> Any person who resides in this state and who is currently employed as a member of the police force, a paid member of the uniformed force of a paid fire department, or department of corrections...of a city of over one million population, shall be exempt from the provisions of [the residency law]....

STATEMENT

Appellants are all experienced firemen with civil service status whose families

reside outside the state[1] but pay the same City and state income taxes as resident firemen. The average distance from the dwellings outside the state to the City is 50 miles compared to an average of 136 miles for the resident firemen, a substantial number of whom live hundreds of miles from the City.

The Appellate Division, which found no necessary correlation between residence within a particular state and proximity to the City, said that some appellants "have much easier access to the place of their employment than their co-workers who reside north of Orange and Putnam Counties in New York State." One of the appellants resides in North Bergen, New Jersey, 2.8 miles from

---

[1]Most of the appellants reside in the City without their families, but for purposes of this appeal the appellants are all referred to as non-residents.

his Engine Company at West 38th Street, which takes 8 minutes to travel to during off-traffic hours.

After years of non-enforcement, the City threatened to enforce the residency law on the theory that "if you work here you should live here." Faced with the choice of immediate dismissal or relocation from their suburban homes to the City, the UFA proposed a bill to immunize hundreds of violators from dismissal and "grandfather in" their current dwellings. The bill, which included in and out-of-state residents, was headed for passage when the Mayor, without supporting the bill, made a political compromise to restrict amnesty to resident violators.

The official purpose of the bill according to the State Office of Employee Relations, was to lessen the "potential for

severe impact resulting in the sudden enforcement of existing law." The Senate sponsor's memorandum in support of the bill summarized its rationale:

> After many years of lax or non-enforcement by these agencies, an attempt is currently being made to strictly enforce the laws. Employees who are valuable civil servants and have performed admirably in their respective agencies face termination of their employment. Apart from living in restricted areas, they are otherwise law abiding and valuable members of their departments. Many of them have young children and spouses who cannot, or will not move into the counties otherwise permitted under the current provisions of the Public Officers Law. Accordingly, these employees are faced with the impossible choice of giving up their careers or living separately from their families.

According to the legislative jacket, neither the UFA, the legislative sponsors nor any other governmental agency or official spokesman for the final bill justified the disparate treatment between

the firemen because of possible additional taxes or other economic benefits to be derived from the up-state residents compared to non-residents[2]. On the other hand, the City's position, expressed in its memorandum to the Governor, was that the City would enjoy more economic and other advantages if City jobs were filled by City residents, i.e., those who reside within the five City counties.

> However, this bill does not address the underlying public policy of residency for City employees. It is the City's intention to pursue residency for future employees at the next session of the Legislature.
>
> It is the City's policy to hire City residents for City jobs. This philosophy is based not only on the obvious economic advantages, but

---

[2]The appellants pay the same City and state taxes as the up-state residents. It can be presumed that the appellants who reside in New Jersey, contiguous to the City, spend more money in the City than the up-state residents.

> the equitable and social considerations which would flow to City residents.

Patently, there was no belief, finding or understanding that up-state residents would bestow any economic benefit upon the City, or more economic benefits compared to non-residents such as appellants.

The amnesty clause required appellants to move into the City, but they were not even given the opportunity to move up-state where the other class of residency law violators reside. Appellants brought these proceedings on the theory that there was no rational basis for the distinction between the classes and that unless applied to them the amnesty clause violates their constitutional rights under the United States Constitution to equal protection, privileges and immunities and, due process of law.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

At the Supreme Court the appellants sought a permanent injunction from dismissal because of their non-residence, and a declaratory judgment that a denial of amnesty clause benefits violates their constitutional rights as aforesaid. The appellants argued, in substance, that for purposes of amnesty there was no rational basis for distinguishing between residents and non-residents and, moreover, that it was clearly irrational to require appellants to move into the City without the right to move up-state where the resident firemen reside.

Justice Eugene Bambrick, in Winkler et al v. Spinnato, et al, (Sup. Ct. Queens County, July 9, 1987) rejected appellants' privileges and immunities claim on the theory that appellants had no "fundamental

right" to be firemen, irrespective of their civil service status:

> In the matter herein, since the court determines that the non-resident plaintiffs affected by the amendments do not have a fundamental interest in being employed by New York City as firemen nor to live where they choose, the privileges and immunities clause is inapplicable and the second step of the analysis need not be undertaken.

With respect to appellants' equal protection claim, Justice Bambrick said:

> The amendments reflect a legislative concern that, if the employment of all the firemen who have violated the residency requirements were terminated, New York City would be faced with a serious shortage of skilled and experienced firemen. The decision to forgive the New York State resident firemen residing outside the lawful counties but not the out-of-state firemen was based on the belief that out-of-staters could not have the loyalty, sense of accountability, and identity with the state and municipality that resident firemen had and, therefore, could not benefit the people of New York State in the same manner. It has also been

> argued by defendants that by residing within the State, public officers would spend their wages here, returning an economic benefit to those whose tax contributions pay the firemen's salaries.

On appeal, the Appellate Division in Winkler et al v. Spinnato et al, 134 A.D.2d 66, 523 N.Y.S.2d 530 (2d Dep't 1987) affirmed, but radically modified the grounds for dismissing appellants' claims.

Applying the traditional rational basis test of Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412, 415 (1920) that there must be a "fair and substantial relation to the object of the legislation" to authorize disparate treatment between the classes, the court dismissed all the traditional reasons for residence distinctions in employment because neither of the two classes "reside within the community in which they are employed (New York City)."

The criterion upon which the classification contained in the challenged amendments is based, i.e., State residence, bears no logical relationship to several of the governmental interests which are frequently cited as justification for local residency requirements. For example, the legitimate interest that a local government might have in diminishing tardiness or absenteeism is not advanced by the creation of a classification among employees based solely upon State residence. As is illustrated by the present case, there is no necessary-correlation between residence within a particular state and proximity to a particular area. In the present case, for example, it is evident that several firefighters who reside in New Jersey have much easier access to the place of their employment than their coworkers who reside north of Orange and Putnam Counties in New York State. Yet, under the classification created by the amendments under review, the New Jersey residents are treated in a substantially less favorable way.

Similarly, a local government's legitimate interest in promoting among its employees a knowledge of, and sense of loyalty to, the community they serve cannot be cited as a rational foundation for the classification devised by the

> Legislature in the present case, since the distinction embodied in the challenged legislation is not between those who, as residents, would spend more time in a given community, and those who, as nonresidents, would spend less time in the community; instead, the distinction is between two classes of persons, none of whom reside within the community in which they are employed (New York City). Thus, a legitimate desire to foster among local officials a familiarity with local conditions may not be cited as a basis for a distinction made between the two classes of nonresidents. (Emphasis added.)

On the other hand, the Appellate Division dismissed the equal protection challenge solely on economic benefit grounds:

> However the 'rational basis' upon which to justify the classification between State residents and out-of-state residents need not relate to the improvement of fire protection; the State may classify employees and the employees of its political subdivisions so as to encourage residence inside the State for any valid reason, including the obvious financial one. Public employees who reside in New York are more likely, as a class, to spend their

> money in New York. Further, public employees who reside in New York are more likely to own real estate here, and to pay property taxes, as well as resident State income tax. For these financial reasons alone, New York may doubtless seek to encourage its employees, and all local public employees as well, to reside within the State and this may be accomplished through the enforcement of a requirement that any State or local employee, as a condition of employment, must reside in the State. It is this fiscal consideration which serves as the rational basis upon which to justify the preference given in this case to the New York City firefighters who reside in the State of New York, regardless of their geographical distance from New York City, over the similarly-situated firefighters who reside in New Jersey or elsewhere. Economic self-interest, therefore, is a legitimate state interest which serves to justify the distinction between State residents and out-of-state residents. (Emphasis added.)

Appellants raised several arguments on appeal: (1)(a) the "spending their money" theory operates in futuro with no application to a statute designed to forgive past unlawful conduct irrespective

of residency; (b) neither of the classes live within the "community in which they are employed (New York City)"; (c) the "live-in-live-off" theory was rejected by this Court in United Building Trades v. Mayor and Council of Camden, 475 U.S. 206, 261, 79 L.Ed.2d 249, 261 (1984); (2) the property tax theory is illusive; only one tax can be paid on a dwelling at one time and nothing is added to the state's treasury by substituting one homeowner for another; (3) the state income tax theory is simply inappropriate as each of the appellants pays the exact same City and state income tax as do the up-state residents.

The Appellate Division conceded that it was more troubled with appellants' privileges and immunities claim than the equal protection argument but sustained the

statute on the ground that public employment is not a "privilege."

> In Hicklin v. Orbeck (supra, at 525), the Privileges and Immunities Clause was held to place limits 'on a State's power to bias employment opportunities in favor of its own residents'. Certainly, based upon dicta such as this, an argument can be made that the amendments now under review, which clearly discriminate against residents of other states, and which clearly bias employment opportunities in favor of residents of this State, offend the Privilege and Immunities Clause. It may well be argued that although the achievement by this State of an economic advantage over its neighbors is a rational basis for the sort of discrimination fostered by the amendments under review, it is not a legitimate basis for such discrimination because it violates the main purpose of the Privileges and Immunities Clause, which is to 'prevent a State from discriminating against nonresidents merely to further its own parochial interests or those of its residents' (Matter of Gordon, 48 NY2d 266, 271....
>
> We are of the opinion that a state law which requires that any or all of its own officers or employees, or any of the officers or employees

> of its political subdivisions, must reside within the state, does not violate the Privileges and Immunities Clause, because state or local public employment is not a 'privilege' which 'bear[s] upon the vitality of the Nation as a single entity' (see also, Matter of Gordon, 48 NY2d 266, 271-272, supra).

The Court of Appeals, 72 N.Y.2d 402, 532 N.Y.S.2d 759 (1988) in a per curiam decision with one dissent, seems to have made new constitutional law.

> We hold that the State of New York may constitutionally draw a distinction between firefighters who have violated only local residency requirements and those who have violated both local and State residency requirements.

The holding appears to be that immunity from dismissal is justified where only one, but not two residency requirements are violated. The trouble with that is that we are here concerned with only one residency requirement, i.e., that the firemen live within the City which is located within the

state. Residency within the state does not satisfy the residency requirement.

The Court of Appeals rejected the privileges and immunities argument on the ground that appellants had no "fundamental right" to employment. As to the equal protection challenge, the Court of Appeals adopted the Supreme Court rationale.

> It is without doubt that 'public employees who reside in New York are more likely, as a class, to spend their money in New York' (134 AD2d 66, 75), thereby returning an economic benefit to the society from whose public fisc the officers' salaries are paid. In addition, State residents contribute more taxes to the State and its municipalities than do non-residents who merely work within the State. Moreover, State residency requirements are premised on the belief that out-of-state residents do not have the same loyalty and commitment to the State as in-state residents.

The following language of the Court of Appeals designed to sustain the rationale of the disparate treatment between the

classes, is so confusing as to seem deliberately designed to beg the question.

> Like all public employees, those receiving amnesty must be State residents. The State has, however, subordinated its local interest to a limited degree, to accommodate those in violation. In order to comply with the state residency requirement, out-of-state residents must move; in-state residents, obviously, need not. Because out-of-state residents are already required to move, there is little reason to excuse them from moving into one of the lawfully designated counties. Because, on the other hand, in-state residents need not otherwise move, they are not being required to do so for the sole purpose of moving into a lawful county. (Emphasis added.)

It must be noted that the Court's admonition that appellants must move into the state "in order to comply with the state residency requirement" is somewhat distorted. Prior to the amnesty clause, firemen were required to move into the City in order to "comply with the state

residency requirement" movement into the state was insufficient.

Secondly, the question is whether appellants have to move into the City, not whether the up-state firemen have to move into the City because the appellants have to move into the state.

In his dissenting opinion Judge Fritz W. Alexander found that the amnesty clause which conferred a benefit on upstate firemen bestowed on the appellants, did not serve a legitimate state interest.

> These amendments confer a benefit on State resident firefighters not conferred on out-of-state firefighters and can survive the instant equal protection challenge only if the resident/non-resident classification is rationally related to a legitimate state interest. (McDonald v. Bd of Election Commissioners, 394 U.S. 802, 809; Maresca v. Cuomo, 64 NY2d 242, 250). Notwithstanding the position advanced by the majority, I am unable to agree that these amendments rationally serve a legitimate state interest.

Judge Alexander agreed with appellants' additional argument that the requirement that the appellants move into the City while the up-state residents remain free to avoid the City, destroys the rationality of the amendment as it does not serve a state interest.

> It is true that a State has a legitimate interest in requiring its public officers to be State residents; State residency requirements benefit the State financially and, in the case of firefighters, encourage public employees skilled in emergency rescue services to spend more time within the State. This State interest, however, is advanced by requiring firefighters to live in the State; it is not rationally served by requiring that the firefighters live in any particular counties within the State. Similarly, while the lawful counties have a legitimate interest in requiring that New York City firefighters reside there, that interest is not rationally served by imposing the local residency requirement on only some New York City firefighters. Thus, the challenged amendments would be

> constitutional if they required the out-of-state firefighters to move into the State or if they required all New York City firefighters to move into a lawful county (McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 646). Neither the State nor the local interest, however, is rationally served by requiring only the out-of-state firefighters to move into the lawful counties.

The dissent addressed the confusing language of the majority quoted at pages 25 and 26 supra.

> The majority concludes that since the State has chosen to impose both State and local residency requirements, it may 'subordinate[] its local interest' and require only the out-of-state firefighters, who violated both residency requirements, to move into a lawful county. The justification for this differential treatment is the fact that the out-of-state firefighters are already required to move to satisfy the State residency requirement. This fact, however, is irrelevant to the choice of the particular county into which they must move -- a choice that is of obvious significance to all the firefighters who violated the local residency requirement for, among

> other reasons, the opportunity to obtain more affordable housing.

Judge Alexander agreed with appellants' argument that this Court had ruled in Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600 (1969) and Zobel v. Williams, 457 U.S. 551, 72 L.Ed.2d 672 (1982) that benefits such as that conferred by the amnesty clause may not be based on past state residency and found that the conferral of amnesty benefits under the circumstances of this case was not a legitimate state interest for equal protection purposes.

> The majority's reasoning, then, begs the question posed in this equal protection challenge -- namely, whether the amendments, which benefit the State resident firefighters by exempting them from the local residency requirement while imposing that requirement on the out-of-state firefighters, are rationally related to a legitimate State interest, A state's interest in conferring a benefit on established state residents is not

a legitimate state interest for purposes of the equal protection analysis in this case. The Supreme Court has held that a state cannot constitutionally confer a benefit upon some state residents and not others solely on the basis of established state residency at a past point in time (Zobel v. Williams, 457 US 55, 63-64; id., at 68 [Brennan, J., concurring]; see also, Shapiro v. Thompson, 394 US 618, 632-33). Although Zobel and Shapiro involved distinctions between old and new state residents, rather than a distinction between residents and non-residents the reasoning of those cases is equally applicable here: '[D]iscrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself.' (Zobel v. Williams, 457 U.S. at 68, supra, [Brennan, J., concurring]). Therefore, New York State may not constitutionally benefit only its State resident firefighters solely because they were State residents on the date that the amendments became effective. (Emphasis added.)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Economic Benefit

Although this case arose on a rather narrow constitutional issue, whether the conferral of benefits in the form of amnesty from the penalty of dismissal for non-compliance with a municipal residency law, violates the equal protection, privileges and immunities or due process rights of appellants, the decision of the New York Court of Appeals has created several substantial equal protection and privileges and immunities questions affecting "residency" cases. Those questions, discussed infra, arise because of the ruling of the Court of Appeals that "spending money," paying taxes and loyalty and commitment to the state at a fixed point in time, justifies disparate treatment between state residents and non-

state residents "none of whom reside within the community in which they are employed," in which they are required to reside; and, in which the state has no imputed interest.

More importantly, and perhaps more complex, is the question inspired by the Court of Appeals and never presented to this Court, whether the distinction which arises from residency in different states can justify disparate treatment between the two classes when neither of the classes has complied with the duty imposed by law, to reside within a fixed municipality.

The question whether the economic benefit to a state from spending money or paying taxes can serve to validate otherwise disparate treatment between residents and non-residents may never have been conclusively determined by this Court.

However, this Court rejected economic benefit as a justification for otherwise unconstitutional discrimination in United Building Trades v. Mayor and Council of Camden, 475 U.S. 208, 261, 79 L.Ed.2d 249, 261 (1984) where geographical classification was not sustained.

> The city also argues that all non-Camden residents employed on city public works projects, whether they reside in New Jersey or Pennsylvania, constitute a 'source of the evil at which the statute is aimed.' That is they 'live off' Camden without 'living in' Camden. (Emphasis added.)

Although the language was directed to a "privileges and immunities" argument, the principle derived seems to be that conferring benefits upon residents to the exclusion of non-residents, cannot be based upon the failure to spend money or pay taxes within a municipality. If that is not the case then this Court should clarify

its rule. If it is, it is important that we know whether the rule applies to equal protection claims as well.

The identical result was reached in an earlier case, Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600 (1969) where a one-year residency requirement for welfare benefits was under equal protection attack. This Court conclusively rejected the argument that the benefits of a statute such as the amnesty clause can be discriminatorily assigned on the basis of "tax contributions."

> Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes.... Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services

> according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services. (Emphasis added.)

394 U.S. 632-633, 22 L.Ed.2d 614.

The constitutional protection against distributing benefits on the basis of tax contributions of non-residents applies both as to past and future contributions.

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.
>
> In sum, neither deterrence of indigents from migrating to the State nor limitation of welfare

> benefits to those regarded as contributing to the State is a constitutionally permissible state objective. (Emphasis added).

Appellants believe this Court can in this case establish a uniform rule or principle of law to guide the states as to whether the economic benefit theory applies equally under equal protection or privileges and immunities attack and when dealing, as here, with present amnesty benefits rather than future welfare benefits; as a reward for spending of money, paying taxes in the past; or as a continuing condition to future benefits.

A "privileges and immunities" attack was involved in Zobel v. Williams, 457 U.S. 551 72 L.Ed.2d 672 (1982) where Alaska awarded dividend distribution benefits from oil royalties to current residents as an incentive to "stay in the State."

> Finally, although Alaska argues that its scheme compensates residents for their prior tangible and intangible contributions to the State, nonresidents are hardly a peculiar source of the 'evil' of partaking in current largess without having made prior contributions. A multitude of native Alaskans-including children and paupers-may have failed to contribute to the State in the past. Yet the State does not dock paupers for their prior failures to contribute, and it awards every person over the age of 18 dividends equal to the number of years that person has lived in the State.
>
> Even if new residents were the peculiar source of these evils, Alaska has not chosen a cure that bears a 'substantial relationship' to the malady.

The "evil" sought to be corrected in the instant case is the <u>future</u> violation of the residency law; but, the amnesty clause does not serve to correct that evil, as the appellant-non-residents are no more a "source-of-the-evil" than the resident violators who will continue to violate the residency law. Clearly, a distinction

between the classes based upon past or future spending of money or tax contributions is irrelevant and has no relationship at all to the malady.

As indicated above, the instant case offers this Court the opportunity to clarify the issue, whether spending money or paying taxes retroactively or prospectively, can justify an otherwise obvious discrimination between residents and non-residents.

Fundamental Right

It is also unclear from existing rulings of this Court and the various circuit courts, whether public employment--after the vesting of civil service status--is a "fundamental right."

As argued infra, there are a series of cases decided or reviewed by this Court which seem to view public employment as

fundamental a right as a private "common calling." For example, in United Building & Construction Trade Council, 465 U.S. 208, 221-222, 79 L.Ed.2d 249, 259 (1984), a fundamental right existed irrespective of whether employees "can or cannot be said to be 'working for the City.'" Other cases discussed infra, suggest the same result. C.D.R. Enterprises, Ltd. v. Bd. of Ed. of City of New York, 412 F. Supp. 1164 (E.D.N.Y.), aff'd 429 U.S. 1031, 50 L.Ed.2d 724 (1976); Graham v. Richardson, 403 U.S. 365, 374, 29 L.Ed.2d 534, 543 (1971); Sugarman v. Dougall, 413 U.S. 634, 37 L.Ed.2d 853 (1973); W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486, (7th Cir. 1984); White v. Thomas, 660 F.2d 680, 684 (5th Cir. 1981) where civil service status would have created a fundamental right.

It is of great importance that this Court lay down a uniform rule to determine whether and to what extent a vested civil service job is a fundamental right to which privileges and increased equal protection rights attach. Indeed, the cases are legion that deal with residency questions--of such variety that there seems to be no consistency in the decisions throughout the United States.

Local Residency Requirements

A further question in need of clarification which was only slightly addressed in United Building & Construction Trade Council, supra, is whether a local residency statute must stand on its own without regard to a state residence statute? Here, the Court of Appeals held that satisfaction of a state residency law ipso facto satisfies a local residency law

which has been subordinated "to a limited degree, to accommodate those in violation." Does the ruling in this case stand for the proposition that a state resident can violate a local residency law but a non-resident cannot? Does such rule of law violate equal protection or privileges and immunities guarantees?

There is a more basic and substantial constitutional question: whether a statute which confers amnesty upon, or grandfathers in, a class of persons is a benefit in and of itself, constitutionally protected against discrimination without regard to residency. Stated another way, can a benefit be conferred solely upon the basis of residence or past residence? That question was answered in the clear language of the dissent in the Court of Appeals decision herein.

> A state's interest in conferring a benefit on established state residents is not a legitimate state interest for purposes of the equal protection analysis in this case/ The Supreme Court has held that a state cannot constitutionally confer a benefit upon some state residents and not others solely on the basis of established state residency at a past point in time (Zobel v. Williams, 457 US 55, 63-64; id., at 68 [Brennan, J., concurring]; see also, Shapiro v. Thompson, 394 US 618, 632-33). Although Zobel and Shapiro involved distinctions between old and new state residents, rather than a distinction between residents and non-residents the reasoning of those cases is equally applicable here.

The foregoing analysis leads to the easy conclusion that there are substantial questions of constitutional law which should be addressed by this Court.

POINT I

THERE IS NO RATIONAL BASIS FOR THE DISPARATE TREATMENT BETWEEN APPELLANTS AND THE UP-STATE FIREMEN

The officially stated reason for the amnesty clause was to create an exception for those firemen who violated the residency law with the unacknowledged consent of their superiors, in order to keep them on the job because of their experience and expertise, irrespective of the distance they live from the City. Applying that reasoning to its logical extreme, if the purpose of the clause was not enforcement of the residency law then an exception must be made for all firemen who violated the law.

Notwithstanding the obvious invalidity of the City's belated attempt to justify the amnesty clause for traditional reasons, the Court of Appeals sustained the

distinction in the classes on the rather dubious and very narrow ground of economic benefit to the state not the City:

> It is without doubt that 'public employees who reside in New York are more likely, as a class, to spend their money in New York' (134 AD2d 66, 75), thereby returning an economic benefit to the society from whose public fisc the officers' salaries are paid. In addition, State residents contribute more taxes to the State and its municipalities than do nonresidents who merely work within the State.

Although the Court of Appeals alluded to the premise that out-of-state residents do not have the same loyalty and commitment as state residents, the Court did not rely upon that ground to sustain its findings. Moreover, the finding of the Appellate Division that because none of the firemen reside in the City, "State residence, bears no logical relationship to several of the governmental interests which are frequently

cited as justification for local residency requirements,"is more logical. Specifically, and wisely, the Appellate Division made a finding that:

> [A] knowledge of and sense of loyalty to the community they serve cannot be cited as a rational foundation for the classification devised by the Legislature in the present case, since the distinction embodied in the challenged legislation is not between those who, as residents, would spend more time in a given community, and those who, as nonresidents, would spend less time in the community; instead, the distinction is between two classes of persons, none of whom reside within the community in which they are employed (New York City).

It is obvious that neither class of firemen herein has more loyalty to the City than the other. Indeed, for that reason the only justification actually relied upon by the Court of Appeals was the economic benefit theory. There are several unassailable arguments for dismissing the

economic benefit theory in this case. Firstly, the Mayor in his own memorandum to the Governor, admonishes that economic benefits will flow to the City only from hiring City residents--not up-state or out-of-state residents.

> It is the City's policy to hire City residents for City jobs. This philosophy is based not only on the obvious economic advantages, but the equitable and social considerations which would flow to City residents.

To thus assign constitutional legitimacy to the amnesty clause distinctions on the basis of "spending money" or "paying taxes" is far beyond logic; firstly, because tax payments are identical; secondly, because neither class--both of whom the Mayor rejects--are presumed to spend money in the municipality in which they are required to live.

In clearer terms, this does not involve a statewide interest which can be preserved by excluding a non-resident from its benefits. We deal here with a local--City residency requirement, not a case in which a non-resident has been rejected for a state job because of non-residency. In such case, the state might claim with more authority, that the "economic benefits" serve as a justification for the difference in treatment.

Aside from the foregoing, this Court must look at the nature of the benefit conferred upon the up-staters, viz., amnesty, and determine whether the distinction in classes is rationally related to a legitimate state interest. The dissenting opinion in the Court of Appeals says it is not because the benefits bestowed are based solely upon the basis of

"state residency at a past point in time." Judge Alexander did not seek to make new law; he relied upon established rulings of this Court in Zobel v. Williams, supra, and Shapiro v. Thompson, supra, which stand firmly for that proposition.

> The Supreme Court has held that a state cannot constitutionally confer a benefit upon some state residents and not others solely on the basis of established state residency at a past point in time (Zobel v. Williams, 457 US 55, 63-64; id., at 68 [Brennan, J., concurring].

In Attorney General of New York v. Soto-Lopez, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986), a civil service employment preference for resident veterans who lived in New York at the time of entry into military service raised the question whether the preference violated the equal protection and the "right to travel" rights of those resident veterans who lived

outside the State at the time they entered service. Finding the preference constitutionally offensive this Court explained the evil.

> Soto-Lopez and Baez-Hernandez have been denied a significant benefit that is granted to all veterans similarly situated except for state of residence at the time of their entry into the military. While the benefit sought here may not rise to the same level of importance as the necessities of life and the right to vote, it is unquestionably substantial. The awards of bonus points can mean the difference between winning or losing civil service employment, with its attendant job security, decent pay, and good benefits.... Furthermore, appellees have been permanently deprived of the veterans' credits that they seek. As the Court of Appeals observed, "[t]he veteran's ability to satisfy the New York residence requirement is ...fixed. He either was a New York resident at the time of his initial induction or he was not; he cannot earn a change in status." Such a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize appellees for exercising

> their rights to migrate. (Emphasis added).

Id. at 909.

Amnesty clause benefits are granted or withheld "based only on the fact of non-residence at a past point in time." It is no answer that the appellants could have purged themselves of the loss of benefits by moving into the City because the up-state firemen are not required to do so. Although this Court viewed the preference statute as a violation of the constitutional "right to travel," that right was not placed into either an equal protection, due process or privileges and immunities category.

> [W]e have not felt impelled to locate this right definitively in any particular constitutional provision. Shapiro, supra.... Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases.

Id. at 905.

Nevertheless, it was concluded that equal protection rights had been violated.

> The state has not met its heavy burden of proving that it has selected means of pursuing a compelling state interest which does not impinge unnecessarily on constitutionally protected interests. Consequently, we conclude that New York's veterans' preference violates appellees' constitutionally protected rights to migrate and to equal protection of the law. (Emphasis added).

The application of Soto-Lopez to the amnesty clause raises an equal protection claim. In fact, Chief Justice Burger in his concurring opinion criticizes the "right to travel" theory as a basis for the majority holding, saying that the only test should have been "rational basis" under equal protection standards.

> In this case the Court of Appeals held that New York's civil service veterans' preference violated both equal protection and the right to travel, relying on Zobel v.

> Williams, 457 U.S. 55, 72 L.Ed.2d 672, 102 S.Ct. 2309 (19982). Shortly after the Court of Appeals decision was issued, we struck down New Mexico's property tax veterans' preference in Hooper v. Bernalillo County Assessor, 472 U.S.___, 86 L.Ed.2d 487, 105 S.Ct 2862 (1985). Both Zobel and Hooper held that the classifications used by the States to award preferences to certain citizens failed to pass a rational basis test under the Equal Protection Clause. As a result, we had no occasion to reach the issues whether classifications would survive heightened scrutiny or whether the right to travel was violated.

The amnesty clause distinction is based solely upon the time when the appellants became non-residents, a distinction which "cannot pass even the minimum rationality test."

A case with compelling application is, Bunyan v. Camacho, 770 F.2d 773 (9th Cir. 1985) (retirement credit preference to government employees who were residents prior to the commencement of undergraduate

studies). Applying the standard rational relationship test because no "suspect class" or "fundamental right" was implicated, the court, relying on Hooper v. Bernalillo County Assessor, 472 U.S.___, 86 L.Ed.2d 487, 105 S.Ct. 2862 (1985), recognized the principle that "rewarding only 'established' residents for such past conduct is not a legitimate purpose." That is the principle which appellants ask this Court to follow.

POINT II

APPELLANTS HAVE A FUNDAMENTAL RIGHT TO THEIR CIVIL SERVICE JOBS

The following cases substantiate the proposition that public employment is a "fundamental right" which calls into question the constitutional validity of the amnesty clause under the privileges and

immunities clause and raises the equal protection threshold to "strict scrutiny."

In United Building and Construction Trades v. Mayor and Council of Camden, 465 U.S. 208, 79 L.Ed.2d 249 (1984), the question before this Court was whether employment on a publicly financed project was a fundamental right.

> In Hicklin v. Orbeck....we struck down as a violation of the Privileges and Immunities Clause an 'Alaska Hire' statute containing a resident-hiring preference for all employment related to the development of the State's oil and gas resources. Alaska argued in that case 'that because the oil and gas that are the subject of Alaska Hire are owned by the State, this ownership, or itself, is sufficient justification for the Act's discrimination against nonresidents, and takes the Act totally without the scope of the Privileges and Immunities Clause'. Id., at 528, 57 L.Ed.2d 397, 98 S.Ct. 2482. We concluded, however, that the State's interest in controlling those things it claims to own is not absolute. 'Rather than placing a statute completely beyond the Clause, a State's

> ownership of the property with which the statute is concerned is a factor-although often the crucial factor-to be considered in evaluating whether the statute's discrimination against non citizens violates the Clause. Id., at 529, 57 L.Ed.2d 397, 98 S.Ct. 2482. See also Baldwin v. Montana Fish and Game Comm'n, 426 U.S., at 385, 56 L.Ed. 352, 98 S.Ct. 1952.
>
> A determination of whether a privilege is 'fundamental' for purposes of that Clause does not depend on whether the employees of private contractors and subcontractors engaged in public works projects can or not be said to be 'working for the city'. The opportunity to seek employment with such private employers to 'sufficiently basic to the livelihood of the nation.' Baldwin v. Montana Fish and Game Comm'n, supra, at 388, 56 L.Ed.2d 354, 98 S.Ct. 1852, as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city.

Id. at 465 U.S. 221-222, 79 L.Ed.2d 258.

In C.D.R. Enterprises, Ltd. v. Bd. of Ed. of City of New York, 412 F.Supp. 1164

(E.D.N.Y.), aff'd, 429 U.S. 1031, 50 L.Ed.2d 724 (1976), the court was faced with a statute which gave preference in public works employment to New York citizens who had been residents for at least one year. The city in defense of plaintiff's claims of unequal protection and due process violations, attempted to justify the statute on the ground that "employment of aliens constitutes an economic detriment to citizens of New York." The court applied a "close judicial scrutiny" test because it said, a "lawfully admitted resident alien is a 'person' within the meaning of the 14th Amendment. The rule that seems to have emerged is that public employment is a suspect class constitutionally guarded by close judicial scrutiny. The court pointed out that Graham v. Richardson, 403 U.S. 365, 374, 29

L.Ed.2d 534, 543 (1971) "rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege'."

> In Graham, which involved the right to welfare assistance, the Court held that even though getting enough food to live could be considered a privilege, public assistance could, nevertheless, not be denied a resident alien. The next question is obviously whether his right to work is not as much protected as his right to eat. In Sugarman v. Dougall, supra, New York could not constitutionally prevent resident aliens from working in the competitive class of the civil service of the state. (Emphasis added).

Ibid.

Continuing its analysis, the court said, referring to Sugarman v. Dougall, 413 U.S. 634, 37 L.Ed.2d 853 (1973), that a "special public interest" could not support a discriminatory classification.

> The court then turned to the state's argument that 'a state constitutionally may confine public employment to citizens.' 413 U.S. at 643, 93 S.Ct. at 2848, 37 L.Ed.2d at 860 (emphasis added). It decided that the 'special public interest' doctrine was no more applicable to justify denial of the right to work in public employment that it has been to deny welfare assistance in Graham v. Richardson, supra. (Emphasis added.)

Id. at 1169.

It is difficult to escape the conclusion that public employment is a "fundamental right."

> The determination of whether there is a constitutional distinction between a 'preference' and an 'exclusion' cannot be based on the superseded doctrine of Crane. The state has a duty to all its lawful residents, resident alien or citizen. It must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the Bar, and that they have equal access to private employment. Truax v. Raich, supra. Its duty to reduce unemployment is as much a duty to the alien as to the citizen for the very reason stated by Mr. Justice Blackmun and Mr. Justice

> Powell.... Discrimination against a class of painters has even less justification to support it than discrimination against the same class (resident aliens), for managerial positions in the civil service. (Emphasis added).

Id. at 1170.

> Once the class is 'suspect' its separate classification invites as close judicial scrutiny as would racial or religious discrimination. One could scarcely contend that the state might grant a 'preference' in public employment to whites over blacks or Protestants over Catholics, or perhaps even to men over women, because of the problem of unemployment.

Ibid.

In W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486 (7th Cir. 1984), which involved an Illinois preference statute, the court raised the threshold of constitutionality by finding that public employment was a common calling.

> Although the burden of proving that state statute violates the privileges and immunities clause is on the plaintiff, once he shows

> that the statute discriminates explicitly against non-residents in 'the pursuit of common callings', Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 387, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978), the state has the burden of justifying the discrimination....

In declaring the preference law unconstitutional, the court followed the "common calling" doctrine of Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 56 L.Ed.2d 354 (1978), and found no justification for the preference for residents.

> After Hicklin, and the recent spate of state court cases invalidating, on the authority of Hicklin, preference laws much like Illinois'...Salla v. County of Monroe, 48 N.Y.2d 514, 423 N.Y.S.2d 878, 399 N.E.2d 909 (1979), [it] must have known that it could not justify the exclusion of nonresidents from employment on all public construction projects without making a better showing of justification that the State of Alaska had been able to make for the 'Alaska Hire' law.

Id. at 498.

In White v. Thomas, 660 F.2d 680, 684 (5th Cir. 1981), the court made the distinction between civil service status or tenure and "at will" employment as deputy sheriff. "He, therefore, had no state protected right to continue in his job, and lacked any property interest in it." Although appellants contend that the basic premise of the court was wrong, the obvious conclusion is, at least, that civil service status or tenure, creates a property right or a fundamental right under the "common calling" doctrine.

As can be seen from the foregoing, the appellants, all of whom are vested civil servants, have a fundamental right to their jobs as vested civil servants. Accordingly, the court below should have applied a strict judicial scrutiny standard to test the class distinction under the

equal protection clause. Under that test, the amnesty clause violates appellants' rights to equal protection of laws. More importantly, the "fundamental right" to retain their civil service jobs renders the amnesty clause void under privileges and immunities standards.

CONCLUSION

Appellants submit that this appeal brings before this Court substantial constitutional questions which require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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Dated: Queens, New York
January 12, 1989

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

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2 No. 303
Ernest Winkler, et al.,
Appellants,
v.
Joseph E. Spinnato, &c., et al.,
Respondents,
The State of New York,
Intervenor-Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Joseph O. Giaimo, Rego Park, for appellants.

Peter L. Zimroth, NYC Corporation Counsel (Ronnie Dane & Pamela Sider Dolgow of counsel) for respondent City of NY.

Robert Abrams, Attorney General (Christopher K. Hall, O. Peter Sherwood, Lawrence S. Kahn of counsel)for intervenor-respondent.

PER CURIAM.

Relying on the Equal Protection Clauses of both the Federal and State Constitutions (US Const 14th Amend; NY Const, art I, §§ 6, 11), as well as the Privileges and Immunities Clause of the Federal Constitution (US Const, art IV, § 2 cl[1]),

petitioners challenge the constitutionality of Public Officers Law §§ 3(19) and 30(5-a) (hereinafter "the amendments"). The amendments require a public officer residing outside New York State to move to one of the lawfully designated counties within one year from the effective date; public officers residing outside one of the designated counties, but within the State, may remain so domiciled but if they move, it must be to one of the designated counties (see Public Officers Law §§ 3[19], 30[5-a]). Henceforth, all those accepting employments as public officers must conform to both State and local residency requirements. We hold that the State of New York may constitutionally draw a distinction between firefighters who have violated only local residency requirements

and those who have violated both local and State residency requirements.

I.

Since 1829, New York has required public officers to be residents of the State (Revised Statutes of the State of New York, title 6, chapter 5, § [1829]). Public officers of local governments have also been required to be residents of the locality by which they are employed (Laws of the State of New York, chapter 7, art 1, § 3 [1829]). After many years of not enforcing the statutory requirements, in 1986 the Fire Department passed order (Order No. 41 dated Apr. 2, 1986, and Order No. 46 dated Apr. 11, 1986) to enforce the residency requirements. After these order, the amendments were passed as a form of amnesty.

The petitioners in this action are firefighters employed by the Fire Department of the City of New York who do not live within the State of New York. They challenge the amendments on the ground that the amendments contain a distinction between two classes of residency law violators based solely upon the criterion of State residence. Petitioners challenge the constitutionality only of the amendments, not the residency requirement per se (see, McCarthy v. Philadelphia Civ. Serv. Commn., 424 US 645; Detroit Police Officers Assn. v. City of Detroit, 385 Mich. 519, 190 NW2d 97, appeal dismissed for lack of a substantial Federal question 405 US 950; Woods v. City of New York, 129 Misc 2d 851, modified on other grounds 114 AD2d 469, affd 69 NY2d 771). The Appellate Division upheld the amendments concluding

that the distinction between the two groups is "founded upon a valid exercise of the State's authority to require its own employees, or the employees of any of its political subdivisions, to reside within this State" (134 AD2d 66, 68). We agree.

II.

Petitioners' argument based on the Privileges and Immunities Clause is without merit. Petitioners have no "fundamental right", within the purview of the Privileges and Immunities Clause, to be employed as New York City firefighters (see United Building and Construction Trades Council of Camden County and Vicinity v. mayor and Council of the City of Camden, 465 US 208, 219; Massachusetts Board of Retirement v. Murgia, 427 US 307; McCarthy v. Philadelphia Civil Service Commission, 424 US 645), since public employment is not

a "privilege which "bear[s] upon the vitality of the Nation as a single entity" (Matter of Gordon, 48 NY2d 266, 271). Therefore, the Privileges and Immunities Clause affords them no protection here (Baldwin v. Fish and Game Commission of Montana, supra).

The challenge under the Equal Protection Clause of both the Federal and State Constitutions must also fail. Since petitioners are not a suspect class (Strauder v. West Virginia, 100 US 303; Loving v. Virginia, 388 US 1; Alevy v. Downstate Med. Center, 39 NY2d 326, 334), and there is "no fundamental right to government employment for purposes of the Equal Protection Clause" (Camden, supra, 465 US at 219), the amendments must be upheld so long as they are "based upon some conceivable and legitimate State interest"

(Maresca v. Cuomo, 64 NY2d 242, 250; see also, Woods v. City of New York, supra).

The State's longstanding interest in requiring its public officers to be State residents in understandable. It is without doubt that "public employees who reside in New York are more likely, as a class, to spend their money in New York" (134 AD2d 66, 75), thereby returning an economic benefit to the society from those public fisc the officers' salaries are paid. In addition, State residents contribute more taxes to the State and its municipalities than do nonresidents who merely work within the State. Moreover, State residency requirements are premised on the belief that out-of-state residents do not have the same loyalty and commitment to the State as in-state residents. Like all public employees, those receiving amnesty must be

State residents. The State has, however, subordinated its local interest to a limited degree, to accommodate those in violation. In order to comply with the state residency requirement, out-of-state residents must move; in-state residents, obviously, need not. Because out-of-state residents are already required to move, there is little reason to excuse them from moving into one of the lawfully designated counties. Because, on the other hand, in-state residents need not otherwise move, they are not being required to do so for the sole purpose of moving into a lawful county. But if they move from their current in-state residence, however, they, like out-of-state residents, must do so in compliance with the local residence law. This limited accommodation to those who already satisfy the State residency

requirement and, therefore, do not have to move for that purpose, is rational and does not violate equal protection.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

WINKLER v. SPINNATO

Case No. 222

ALEXANDER, J. (dissenting):

Because I believe that in requiring only out-of-state firefighters to move into a lawful county the State is unconstitutionally conferring a benefit on its established residents, I respectfully dissent.

New York requires public officers of local governments to be residents of both the State and the locality in which they are employed. (Public Officers Law §§ 3(1)

and 30(1)[d]). New York City Firefighters, however, were permitted to live in one of six counties contiguous to New york City or in one of the counties within the City itself (together "the lawful counties"). (Public Officers Law §§ 3(9) and 30(5)). When, in 1986, after many years of nonenforcement, the New York City Fire Department issued administrative orders enforcing these residency requirements, the Legislature amended Public Officers Law §§ 3 and 30 by adding §§ 3(19) and 30(5-a) ("the amendments"). While requiring out-of-state firefighters to move into a lawful county, the amendments exempt the State resident firefighters from this local residency requirement. Specifically, the amendments provide that State resident firefighters currently in violation of the local residency requirement need not comply

with that requirement until such time as they may choose to move from their present residences. Out-of-state firefighters, however, are not so exempted; instead they are required to move into a lawful county within one year of the effective date of the amendments. Although the amendments treat all firefighters equally in that their initial move must be to a lawful county, plainly it is only the out-of-state firefighters who must comply with the local residency requirement.

These amendments confer a benefit on State resident firefighters not conferred on out-of-state firefighters and can survive the instant equal protection challenge only if the resident/non-resident classification is rationally related to a legitimate state interest. (McDonald v. Bd of Election Commissioners, 394 U.S. 802,

809; Maresca v. Cuomo, 64 NY2d 242, 250). Notwithstanding the position advanced by the majority, I am unable to agree that these amendments rationally serve a legitimate state interest. It is true that a State has a legitimate interest in requiring its public officers to be State residents; State residency requirements benefit the State financially and, in the case of firefighters, encourage public employees skilled in emergency rescue services to spend more time within the State. This State interest, however, is advanced by requiring firefighters to live in the State; it is not rationally served by requiring that the firefighters live in any particular counties within the State. Similarly, while the lawful counties have a legitimate interest in requiring that New York City firefighters reside there, that

interest is not rationally served by imposing the local residency requirement on only some New york City firefighters. Thus, the challenged amendments would be constitutional if they required the out-of-state firefighters to move into the State or if they required all New York City firefighters to move into a lawful county (McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 646). Neither the State nor the local interest, however, is rationally served by requiring only the out-of-state firefighters to move into the lawful counties.

The majority concludes that since the State has chosen to impose both State and local residency requirements, it may "subordinate[] its local interest" and require only the out-of-state firefighters, who violated both residency requirements,

to move into a lawful county. The justification for this differential treatment is the fact that the out-of-state firefighters are already required to move to satisfy the State residency requirement. This fact, however, is irrelevant to the choice of the particular county into which they must move --a choice that is of obvious significance to all the firefighters who violated the local residency requirement for, among other reasons, the opportunity to obtain more affordable housing.

The majority's reasoning, then, begs the question posed in this equal protection challenge -- namely, whether the amendments, which benefit the State resident firefighters by exempting them from the local residency requirement while imposing that requirement on the out-of-

state firefighters, are rationally related to a legitimate State interest. A state's interest in conferring a benefit on established state residents is not a legitimate state interest for purposes of the equal protection analysis in this case. The Supreme Court has held that a state cannot constitutionally confer a benefit upon some state residents and not others solely on the basis of established state residency at a past point in time (Zobel v. Williams, 457 US 55, 63-64; id., at 68 [Brennan, J., concurring]; see also, Shapiro v. Thompson, 394 US 618, 632-33). Although Zobel and Shapiro involved distinctions between old and new state residents, rather than a distinction between residents and non-residents, the reasoning of those cases is equally applicable here:

"[D]iscrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself." (Zobel v. Williams, 457 U.S. at 68, supra [Brennan, J., concurring]). Therefore, New York State may not constitutionally benefit only its State resident firefighters solely because they were State residents on the date that the amendments became effective.

Accordingly, I conclude that Public Officers Law §§ 3(19) and 30(5-a) violate the equal protection clauses of the Federal and State Constitutions and I would reverse the order of the Appellate Division and grant the petition.

* *

Order affirmed, with costs. Opinion Per Curiam in which Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur. Judge Alexander dissents and votes to reverse in an opinion.

Decided October 20, 1988

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Argued - September 15, 1987

---AD2d---

LAWRENCE J. BRACKEN, J.P.
RICHARD A. BROWN
JAMES F. NIEHOFF
SYBIL HART KOOPER, JJ.

3675E

Ernest Winkler, et al., appellants, V Joseph E. Spinnato, etc., et al., respondents, The State of New York, intervenor-respondent.

ORDER

Giaimo, Vreeburg & Rosen, Forest Hills, N.Y. (Joseph O. Giaimo of counsel), for appellants.

Peter L. Zimroth, Corporation Counsel, New York, N.Y. (Pamela Seider Dolgow and Ronnie Dane of Counsel), for respondents.

Robert Abrams, Attorney-General, New York, N.Y. (Christopher Hall,

Richard G. Liskov and

Hugh B. Weinberg of counsel), for intervenor-respondent.

Appeal by the plaintiffs from a judgment of the Supreme Court, Queens County (Bambrick, J.), entered August 18, 1987.

ORDERED that the judgment is modified, on the law, by adding a provision declaring that Public Officers Law §§ 3(19) and 30(5-a) are constitutional as applied to the plaintiffs; as so modified, the judgment is affirmed, with one bill of costs payable to the defendants and the intervenor appearing separately and filing separate briefs.

OPINION by BRACKEN, J.P.

BROWN, NIEHOFF, and KOOPER, JJ., CONCUR.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

December 28, 1987

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

BRACKEN, J.P., BROWN and NIEHOFF, KOOPER, JJ.

ERNEST WINKLER, et al.,

Appellants,

-against-

JOSEPH E. SPINNATO, etc., et al.

Respondents,

THE STATE OF NEW YORK,

Intervenor-Respondent.

APPEAL by the plaintiffs from a judgment of the Supreme Court, (Eugene P. Bambrick, J.), entered August 18, 1987 in Queens County, which, inter alia granted summary judgment to the defendants.

Giaimo, Vreeburg & Rosen
Forest Hills, N.Y.
(Joseph O. Giaimo of counsel),
for appellants.

Peter L. Zimroth
Corporation Counsel,
New York, N.Y.
(Pamela Seidor Dolgow and
Ronnie Dane of counsel),
for respondents.

Robert Abrams
Attorney-General
New York, N.Y.
(Christopher Hall, Richard G.
Liskov and Hugh B. Weinberg
of counsel),
for intervenor-respondent.

BRACKEN, J.P.

On this appeal, we determine that the State of New York, in enforcing its traditional policy of requiring certain employees of local governments to reside within or near the political unit in which they serve, may draw a distinction between those public employees who have violated local residency requirements by living outside the State, and those public

employees who have violated such laws by residing in unsanctioned locations within the State. Although the imposition of more stringent measures of enforcement upon the former class of public servants may be perceived as a form of discrimination against a group of persons based solely upon State residence, we conclude that that discrimination is founded upon a valid exercise of the State's authority to require its own employees, or the employees of any of its political subdivisions, to reside within this State. In our opinion, this discrimination based solely on State residence has a rational basis so as to conform with the principles of the Equal Protection Clause (US Const. 14th Amend; NY Const, art 1, § 11). Such discrimination, moreover, does not violate the Privileges and Immunities Clause (US Const art IV, §

2, cl 1). Therefore, the arguments advanced by the plaintiffs - appellants that certain recent amendments to the New York State Public Officers Law (Public Officers Law § 3[19], 30[5-a]; L 1986, ch 509, § 1, 2, eff. July 22, 1986) are unconstitutional, are without merit.

I

The plaintiffs in this action are firefighters employed by the Fire Department of the City of New York (hereinafter the fire department). Several of them do not reside within the State of New York, but live in New Jersey, Connecticut, or Pennsylvania. Several other plaintiffs aver that while they personally maintain a residence within this State, and within the areas described in Public Officers Law § 3(9) and 30(5), their

wives and children reside in homes located outside this State.

By action commenced in November 1986 the plaintiffs sought a judgment declaring that Public Officers Law § 3(19) and 30(5-a), are unconstitutional as applied to them. The plaintiffs relied upon the Equal Protection and Due Process Clauses of the Federal and State Constitutions (US Const, 14th Amend; NY Const, art 1, § 6, 11) as well as the Privileges and Immunities Clause of the Federal Constitution (US Const, art IV, § 2, cl 1).[1]

In addition, the plaintiffs sought a judgment declaring that any particular

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[1]. The plaintiffs first invoked the Privileges and Immunities Clause in a proposed amended complaint, dated May 7, 1987. The record on appeal does not establish whether leave to serve this complaint was ever granted. However, the defendants served an answer to the amended complaint without objection to the propriety of the amendments.

firefighter who maintains a residence in one of the counties delineated in Public Officers Law § 3(9) and 30(5) may not be presumed to be in violation of the residency requirements contained in those statutes solely upon the ground that the firefighter's spouse and children reside outside the State. The plaintiffs allege that their employers have utilized that presumption and have arbitrarily decreed that for purposes of applying the residency rule, a firefighter does not reside in or "inhabit" a particular place unless the firefighter's spouse and children reside at the same location.

The plaintiffs further sought an injunction (1) permanently enjoining the defendants from acting to dismiss them from their positions pursuant to the challenged provisions of the Public Officers Law, and

(2) permanently enjoining the defendants from dismissing any one of the plaintiffs by reason of the residence of that plaintiff's family outside the State.

After issue was joined, the plaintiffs made a motion for summary judgment and for a preliminary injunction. The defendants responded with a cross motion to dismiss the complaint pursuant to CPLR 3211(a)(7). Both the motion and the cross motion were denied, but the court granted summary judgment to the defendants pursuant to CPLR 3212(b). This appeal followed.

II

Public Officers Law § 3(1) provides that "[n]o person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto * * * be a citizen of the United States, a resident of the state, and if it be a local

office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen * * * or within his official functions are required to be exercised". Pursuant to § 30(1)(d) of the Public Officers Law, a public office is deemed to have become vacant as soon as its incumbent ceases to be an inhabitant of the State or political subdivision of which he was required to be a resident at the time he was chosen.

The scope of the general residency requirement embodied in those provisions has undergone a gradual process of erosion in recent years. Public Officers Law § 3 is now replete with special exemptions for variously defined classes of public officers. None of these exemptions goes so far as to eliminate the requirement of United States citizenship, and only very

few of the exemptions permit the officeholder to reside outside of this State (see, e.g., Public Officers Law §§ 30[3], [3-a], [7] [allowing attorneys who live in another state but who practice in this State to serve as notaries public or as commissioners of deeds in the City of New York]). However, the requirement of local residence has been waived, upon various conditions, for a wide variety of local public officers.

The exemptions applicable to New York City firefighters is contained in Public Officers Law § 3(9), which provides as follows:

> "9. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required

> to be exercised, shall apply to the appointment of a paid member of the uniformed force of a paid fire department or to the appointment of any person employed in a department of correction in the correction service classification of the classified civil service, or to the appointment of officers and inspectors who are employees of a department of health of any city of over one million population who resides (a) in the county in which such city is located; or (b) in a county within the state contiguous to the county in which said city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city."

This exemption was enacted over 25 years ago (L 1962, ch 976, § 1), and has the effect of requiring New york City firefighters to reside either within the city limits, or within any one of six suburban counties (Nassau, Suffolk, Westchester, Rockland, Orange, and Putnam) located within the State of New York.

Public Officers Law § 30(5) contains a parallel exemption.

III

After it became evident that several New York City firefighters were violating the requirements of Public Officers Law § 3(9) and 30(5), the fire department issued a series of orders (Order No. 41 dated April 2, 1986, and Order No. 46, dated April 11, 1986) pursuant to which all firefighters who believed themselves to be in violation of the residency laws were required to so notify the Inspector General, move into a lawful county by May 30, 1986, and have their families move into a lawful county by September 1, 1986, unless, "as a result of special circumstances, the member legitimately resides at a domicile different from that of his or her family". Nicholas Mancuso,

as President of the Uniformed Firefighters Association, joined by other plaintiffs, made an application to the Supreme Court, New York County for an order postponing the enforcement of the fire department Order Nos. 41 and 46, which application was denied by Justice Baer in an order dated May 13, 1986.

Realizing that enforcement of the residency laws was about to begin in earnest, and that such enforcement would result in personal hardship to a large number of New York City firefighters, as well as other affected municipal employees, the state legislature amended Public Officers Law §§ 3 and 30 so as to in effect grant a qualified reprieve to residency-law violators. Specifically, the Legislature added subdivision 19 to Public Officers Law § 3, and also added subdivision 5-a to

Public Officers Law § 30 (L 1986, ch 509, §§ 1, 2). Public Officers Law § 3(19) provides as follows:

> "19. Any person who resides in this state and who is currently employed as a member of the police force, a paid fire department or department of corrections in the correctional service classification of the classified civil service, of a city f over one million population, shall be exempt from the provisions of subdivisions one, two and nine of this section upon compliance with the procedure set forth in this subdivision. Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in writing of said intention within thirty days from the effective date of this subdivision and shall specify his then current residence address. The exemption created by this subdivision shall by applicable only to said actual designated residence and not to any residence that any subject currently employed member may thereafter establish; provided, however, that any such currently employed member who resides outside this state shall have one year from the effective date of this subdivision within which to establish residence as required pursuant to subdivisions

> one, two and nine of this section and comply with the notice requirement of this subdivision. Said residence shall constitute a lawful residence for all purposes notwithstanding any provision to the contrary of any general, special or local law, charter, code, ordinance resolution" (emphasis supplied).

Public Officers Law § 30(5-a) contains a parallel provision.

As can be seen, these amendments contain a distinction between two classes of residency law violators based solely upon the criterion of State residence. Violators of the residency requirements of Public Officers Law §§ 39 and 30(5) are permitted to retain their current indefinitely if, and only if, they reside in this State. Similarly-situated violators of the same statutes who live outside the State are required to leave their homes within one year or else lose their jobs. The main contention of the

plaintiffs in this case is that since the conditions attached to this legislative reprieve are more stringent with respect to residency law violators who reside outside the State than with respect to those violators who reside within the State, an arbitrary classification has been created based solely upon the criterion of state residence. They claim that this offends both the Equal Protection clauses of the State and Federal Constitutions (US Const 14th Amend; NY Const, art. I, §11) and the Privileges and Immunities clause of the Federal Constitution (US Const, Art. IV, § 2).

IV

Section 1 of the 14th Amendment to the Constitution of the United States provides, in relevant part, that "no State shall* * * deny to any person within its jurisdiction

the equal protection of the laws". This clause was written as part of one of the post-Civil War amendments and its original purpose was to raise the members of the black race, including the then recently emancipated slaves, to a position of equality with whites, and to completely extirpate from state laws any distinction founded upon the criterion of race (see, Palmer v. Thompson, 403 US 217, 220; Strauder v. West Virginia, 100 US 303; Ex parte Virginia, 100 US 339). Although its original objective was thus to protect a specific class from state-sponsored discrimination, the Supreme Court of the United States soon held that the broad language of this clause guarantees that all persons, of whatever race, will be protected from the state legislation which arbitrarily discriminates against them (see

e.g., Bachtel v. Wilson, 204 US 36; Buchanan v. Warley, 245 US 60; Alevy v. Downstate Med. Center of State of N.Y., 39 NY2d 326, 334;). The Equal Protection Clause protects citizens not only against the effects of State laws which contain invidious distinctions between similarly-situated persons, but also grants the discriminatory enforcements of facially neutral statutes (see e.g., Yick Wo v. Hopkins, 118 US 356).

However, it has always been recognized that the Fourteenth Amendment permits the states wide discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds "wholly irrelevant to the achievement of the State's objective" (McGowan v.

Maryland, 366 US 420, 425; see also, Eisenstadt v. Baird, 405 US 438, 446-447). Under the traditional "rational-basis" test, a state law which authorizes the disparate treatment of different classes will be upheld if the classification embodied in the law is founded upon some basis "having a fair and substantial relation to the object of the legislation" (Royster Guano Co. v. Commonwealth of Virginia, 253 US 412, 415; see also, Johnson v. Robison, 415 US 361, 374-375; Reed v. Reed, 404 US 71, 75-76).

Of relatively recent vintage in the history of the judicial interpretation of the Equal Protection Clause are those decisions which hold that legislatively-created classifications will be subject to a more exacting form of judicial scrutiny wherever the criterion upon which the

distinction is based is a "suspect" one (e.g., Korematsu v. United States, 323 US 214, reh denied 324 US 885 [racial criterion]) or wherever the classification may be said to affect a "fundamental right" (e.g., Reynolds v. Sims, 377 US 533, reh denied 379 US 870 [right to vote]). But it has been expressly held that there "is no fundamental right to government employment for purposes of the equal protection clause" (United Bldg. & Constr. Trades Council v. Mayor and Council, 465 US 208, 219; Massachusetts Bd. of Retirement v. Murgia, 427 US 307, 313; see also, Vance v. Bradley, 440 US 93, 96-97; Maresca v. Cuomo, 64 NY2d 242, 250, appeal dismissed 474 US 802), and the plaintiffs cite no authority for the proposition that residents of other States comprise a "suspect" class for the purposes of equal

protection (although, as discussed below, the Privileges and Immunities Clause may prohibit discrimination based on state residence, even where such discrimination could be said to have a rational basis). Thus, the legislative classification created in the statutory amendments under review should not be overridden by the courts unless no rational basis for the distinction exists.

Because there is no fundamental right to public employment, the Supreme Court of the United States has applied this "rational basis" test in upholding laws which contain local, intra-state residency requirements, and which thus distinguish between those who reside within a particular locality and those who do not (see, McCarthy v. Philadelphia Civil Service Commn, 424 US 645; Detroit Police

Officers Assn. v. City of Detroit, 385 Mich 519, 190 NW2d 97, appeal dismissed for lack of a substantial Federal question 405 US 950). Several courts throughout the nation similarly have upheld laws which require the employees of local governments to live within (or near) the boundaries of the political subdivision in which they are employed (see, e.g., Carofano v. City of Bridgeport, 196 Conn 623, 495 A2d 1011; Ector v. City of Torrance, 108 Cal Rptr 849, 514 P2d 433, cert denied 415 US 935; Lines v. City of Topeka, 223 Kan 772, 577 P2d 42; Abrahams v. Civil Service Commission 65 NJ 61, 319 A.2d 483; Loiselle v. City of East Providence, 359 A2d 345 [RI]; Wardwell v. Board of Ed. of City School Dist. of City of Cincinnati, 529 F2d 625 [6th Cir]; Mogle v. Sevier County School Dist., 540 F2d 478 [10th Cir], cert

denied 429 US 1121; Ahern v. Murphy, 457 F2d 363 [7th Cir]; Wright v. City of Jackson, 506 F2d 900 [5th Cir]). "[L]ocal governments may lawfully require as a condition of employment that employees reside within their territorial limits" (Mandelkern v. City of Buffalo, 64 AD2d 279, 280; see also, Mazzo v. County of Monroe, 58 AD2d 1017, 1018).[2]

An important distinction must be observed between the laws which were upheld

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[2]. Such a residency requirement was, however, invalidated under the provisions of New Hampshire's State Constitution in Angwin v. Manchester (118 NH 336, 386 A2d 1272) and Donnelly v. Manchester (111 NH 50, 274 A2d 789). This result is contrary to the general consensus among state and Federal courts alike, and we reject it as unfounded. It is also noteworthy that at least one court, prior to the Supreme Court's decision in McCarthy v. Philadelphia Civil Service Commn (424 US 645) upheld the validity of such a residency requirement even under a "strict scrutiny" standard (see, Krzewinski v. Kugler, 338 F Supp 492 [Dist Ct NJ]).

in these cases and the amendments to the Public Officers Law before us in this case. Each of the cases cited involved a law or ordinance conditioning public employment or some advantage of public employment upon residence within a particular geographic area. Such laws apply even-handedly to all those who fail to reside within the are described in the law, regardless of State residence. The amendments before us here involve a form of discrimination based solely upon State residence. Indeed, the plaintiffs take no position on the validity of the original residency requirements contained in Public Officers Law §§ 3(9) and 30(5), and we assume their validity for the purposes of this appeal. The sole argument advanced by the plaintiffs is that the ameliorative amendments to those statutes (Public Officers Law §§ 3[19],

30[5-a]) are unconstitutional because they involve an arbitrary discrimination between similarly-situated individuals based solely upon State residence.

The criterion upon which the classification contained in the challenged amendments is based, i.e., State residence, bears no logical relationship to several of the governmental interests which are frequently cited as justification for local residency requirements. For example, the legitimate interest that a local government might have in diminishing tardiness or absenteeism is not advanced by the creation of a classification among employees based solely upon State residence. As is illustrated by the present case, there is no necessary correlation between residence within a particular state and proximity to a particular area. In the present case,

for example, it is evident that several firefighters who reside in New Jersey have much easier access to the place of their employment than their coworkers who reside north of Orange and Putnam Counties in New York State. Yet, under the classification created by the amendments under review, the New Jersey residents are treated in substantially less favorable way.

Similarly, a local government's legitimate interest in promoting among its employees a knowledge of, and sense of loyalty to, the community they serve cannot be cited as a rational foundation for the classification devised by the Legislature in the present case, since the distinction embodied in the challenged legislation is not between those who, as residents, would spend more time in a given community, and those who, as nonresidents, would spend

less time in the community; instead, the distinction is between two classes of persons, none of whom reside within the community in which they are employed (New York City). Thus, a legitimate desire to foster among local officials a familiarity with local conditions may not be cited as a basis for a distinction made between the two classes of nonresidents.

However, the "rational basis" upon which to justify the classification between State residents and out-of-state residents need not relate to the improvement of fire protection; the State may classify employees and the employees of its political subdivisions so as to encourage residence inside the State for any valid reason, including the obvious financial one. Public employees who reside in New

York are more likely, as a class, to spend their money in New York.

Further, public employees who reside in New york are more likely to own real estate here, and so pay property taxes, as well as resident state income tax. For these financial reasons alone, New York may doubtless seek to encourage its employees, and all local public employees as well, to reside within the State, and this may be accomplished through the enforcement of a requirement that any State or local employee, as a condition of employment, must reside in the State. It is this fiscal consideration which serves as the rational basis upon which to justify the preference given in this case to the New York city firefighters who reside in the State of New York, regardless of their geographical distance from New York City,

over the similarly-situated firefighters who reside in New Jersey or elsewhere.[3] Economic self-interest, therefore, is a legitimate state interest which serves to justify the distinction between State residents and out-of-state residents.

In short, the amendments under review meet the "rational basis" test and so comport with principles of equal protection.

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[3]. It may also be noted that these economic concerns which justify discrimination on the basis of State residents, are not available to serve as justification for discrimination based on alienage. Lawfully resident aliens "work in the State and contribute to the economic growth of the state" (Graham v. Richardson, 403 US 365, 376). Those decisions which invalidate legislative distinctions based on alienage are therefore not controlling (see, Sugarman v. Dougall, 413 US 634 [broad prohibition against employment of aliens in civil service unconstitutional]; cf., Ambach v. Norwick, 441 US 68; Foley v. Connelie, 435 US 291 [discrimination against aliens in certain narrow areas of public employment allowed]).

V

There remains to be addressed the plaintiffs' contention that the challenged amendments violate the Privileges and Immunities Clause of the Federal Constitution.[4] This is substantially

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[4]. Although in their complaint, the plaintiffs do not rely upon the separate constitutional right to travel, several of the cases upon which they rely on appeal were decided on the basis of the existence of that right (e.g., Attorney General of New York v. Soto Lopez, 476 U.S. 898; Memorial Hosp. v. Maricopa County, 415 U.S. 250; Shapiro v. Thompson, 394 U.S. 618). The cases cited above dealt with legislative distinctions based upon the duration of a particular person's residence in a given state, not upon the criterion of state residence itself. The validity of a durational residency requirement is not at issue in the present case (cf., Berger v. Friese, 45 A.D.2d 734, appeal dismissed 35 N.Y.2d 712; Phelan v. City of Buffalo, 54 A.D.2d 262). Those cases are therefore inapposite. The right to travel includes the right "to migrate, resettle, find a new job, and start a new life" (Shapiro v. Thompson, supra, at p. 629), and does not protect any supposed right of movement back and forth across the state lines as part of

different issue than that posed with respect to the Equal Protection Clause.

Clause 1 of section 2 of article IV of the United States Constitution provides that "[t]he Citizen of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". This provision, which, like the Commerce Clause, was derived from article IV of the Articles of Confederation, has among its principal goals the promotion of national economic unity, the prevention of discrimination by states against citizens of other states (see, Hicklin v. Orbeck, 437 US 518, 523-524; Baldwin v. Fish & Game Commn. of

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a commute to work (see, Carofano v. City of Bridgeport, 495 A.2d 1011, 1020). Thus, we dot not believe that the right to travel is implicated in the present case. Also,we do not consider plaintiffs' arguments based on the Due Process Clauses of the Federal or State Constitutions to be any different than those advanced under the Equal Protection Clause.

Montana, 436 US 371, 378-382; Toomer v. Witsell, 334 US 385, reh denied 335 US 837; The Slaughter-house Cases, 83 US 36). In Toomer v. Witsell (supra, at 396) it was stated that the Privileges and Immunities Clause "bar[s] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States". In Hicklin v. Orebeck (supra, at 525), the Privileges and Immunities Clause was held to place limits "on a State's power to bias employment opportunities in favor of its own residents". Certainly, based upon dicta such as this, an argument can be made that the amendments now under review, which clearly discriminate against residents of other states, and which clearly bias employment opportunities in favor of

residents of this state, offend the Privilege and Immunities Clause. It may well be argued that although the achievement by this state of an economic advantage over its neighbors is a rational basis for the sort of discrimination fostered by the amendments under review, it is not a legitimate basis for such discrimination because it violates the main purpose of the Privileges and Immunities Clause, which is to "prevent a State from discriminating against nonresidents merely to further its own parochial interests or those of its residents" (Matter of Gordon, 48 NY2d 266, 271.

However, upon a closer examination of the history of the Privileges and Immunities Clause, it is apparent that it would be overly simplistic to suggest that that clause was meant to prohibit all forms

of discrimination based on state residence. A state may, for example, prohibit nonresidents from demanding state services which are restricted to residents (see, e.g., Martinez v. Bynum, 461 US 321 [upholding state law restricting right to tuition-free school to state residents]; Vlandis v. Kline, 412 US 441, 452-453 [upholding right of state to give preference to state residents with respect to tuition at state colleges]). A state may also prevent nonresidents from voting in state elections (see, Dunn v. Blumstein, 405 US 330). As noted in Baldwin v. Fish and Game Commn. of Montana (supra, at 383),

> "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges'

> and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally".

We are of the opinion that a state law which requires that any or all of its own officers or employees, or any of the officers or employees of its political subdivisions, must reside within the state, does not violate the Privileges and Immunities Clause, because state or local public employment is not a "privilege" which "bear[s] upon the vitality of the Nation as a single entity" (see also, Matter of Gordon, 48 NY2d 266, 271-272, supra). This, it cannot be claimed that the amendments under review, which in effect enforce the requirement of New York State residence for public employees, are unconstitutional.

It has been specifically stated that the Privileges and Immunities Clause is not offended by a state law which requires state residence as a qualification for elective office (Baldwin v. Fish and Game Commn. of Montana, 436 US 371, 383, supra). Similarly, the New York Court of Appeals, in Matter of Gordon (supra, at 271) noted that a state may distinguish between residence and nonresidents with respect to the "entitlement to public office". These statements are based on the view that a state's ability to require that its employees, or the employees of its political subdivisions, reside within the state is a "matter which directly implicate[s] its sovereignty" (see, Matter of Gordon, 48 NY2d 266, 271, supra). In other words, the right to hold a state office is not a "privilege" protected by

this constitutional provision (Hogan v. Hartwell, 242 Ala 646, 7 So 2d 889, 891; Shaw v. City Council v. Marshalltown, 131 Iowa 128, 104 NW 1121, 1124).

More recent cases from the Supreme Court of the United States reflect the view that public employment is to be distinguished from private employment, and that discrimination based on state residence may be tolerated in connection with the former, although not with the latter. In United Bldg. & Constr. Trades Council v. Mayor and Council (465 US 208, 218, 219, supra), the court held that a law, pursuant to which state residents were preferred to nonresidents in connection with certain public work projects, was held unconstitutional, and stated that "public employment is * * * qualitatively different from employment in the private sector".

Although public funds were being extended on the work projects under review in that case, the court held that a local residency requirement represented an effort to "bias private employment decisions in favor of [state] residents" (United Bldg. & Constr. Trades counsel v. Mayor and Council, supra, at 221 [emphasis supplied]). The clear implication is that purely public employment decisions, consistent with the Federal Constitution, may favor state residents.

Similarly, in Supreme Court of N.H. v. Piper (470 US 274) a rule requiring state residence as a condition for admission to the bar was held to be unconstitutional. It was noted that the practice of the law did not involve an "exercise of state power" (Supreme Court of N.H. v. Piper, supra, at 282). The court further stated

that the state powers entrusted to lawyers did not "'involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens'" (Supreme Court of N.Y. v. Piper, supra, at 283, quoting from In re Griffiths, 413 US 717, 724). Because lawyers are not state officials in a political sense, the practice of law could be considered an area of employment opportunity within the scope of the Privileges and Immunities Clause. The implication, again, is that discrimination based on state residence with respect to purely public offices is not subject to scrutiny under the Privileges and Immunities Clause.

Further indication that the Privileges and Immunities Clause does not inhibit the states from preferring their own residents in connection with public employment

opportunities can be found in the case of Woods v. City of New York (129 Misc 2d 851, mod on other grounds 119 AD2d 469, affd 69 NY2d 771). In Woods, a provision of New York law in connection with promotional opportunities in certain civil service employment, pursuant to which resident veterans are preferred over nonresident veterans, specifically, the rule allowing honorably discharged veterans of the armed services who reside in New York to receive an additional two and one-half points on certain civil service examinations, was upheld (NY Const, art V, § 6). A constitutional challenge to that provision premised on the argument that it entailed discrimination against veterans who resided in New Jersey, and so violated the Privileges and Immunities Clause was specifically rejected.

The argument that the Privileges and Immunities Clause should be interpreted so as to prohibit discrimination based upon state residence, even with respect to a state's definition of the qualifications required of its own employees, exalts one interest protected by the Federal Constitution, that is, the encouragement of economic harmony between the states, to the complete exclusion of another even more basic constitutional value, that is, the preservation of individual state sovereignty. "The States unquestionably do 'retai[n] a significant measure of sovereign authority'" (Garcia v. San Antonio Metro. Transit Auth., 469 US 528, 549, quoting from EEOC v. Wyoming, 460 US 226, 269; see also, Reeves, Inc. v. Stake, 447 US 429, 438, n 10; Boyd v. Nebraska, 143 US 135, 161; cf., Sugarman v. Dougall,

413 US 634, 647, supra). The plaintiffs have not demonstrated by any evidence, historical or otherwise, that it was intended or expected that the Privileges and Immunities Clause, the principal goal of which was designed to achieve the economic unity of the United States, should override the equally compelling interest of preserving the independent interests of each sovereign state. We perceive no valid basis, therefore, for the extension of the proscriptions of the Privileges and Immunities Clause beyond the realm of private economic activity or beyond the realm of private economic activity in which a state may have some role (see, United Bldg. & Constr. Trades Council v. Mayor and Council, supra; see also, Salla v. County of Monroe of State of N.Y., 48 NY2d 514, cert denied 446 US 909 [invalidating

statutory preference for state residents in public work projects]; cf., People v. Crane, 214 NY 154, affd 239 US 195), and into the purely public area of direct employment by a state or by any of its political subdivisions. As a basic matter of its own sovereignty, "the state may confine to citizens the right to hold public office" (People v. Crane, supra, at 163).

The State of New York may therefore enforce its rule requiring New York City firefighters to reside within State. The State may do so, even while choosing not to similarly enforce its rule requiring New York City firefighters to reside within or near New York City. No valid objection can be raised to the sections of the Public Officers Law now under review (Public Officers Law §§ 3[19], 30[5-a]) which, in

effect, impose harsher enforcement measures on those who have violated both State and local residency requirements than upon those who have violated the local residency requirements only. Although this does not amount to discrimination on the basis of State residence, it is a valid form of discrimination since it is designed to further the State's rightful goal of limiting to its own citizens the privilege of public employment.

We therefore conclude that the statutory amendments under review are valid.

VI

In addition to their request for a judgment declaring that Public Officers Law §§ 3(19) and 30(5-a) are unconstitutional, the plaintiffs sought "a declaratory judgment that a fireman may be a lawful

inhabitant and domiciliary of a lawful county under the provisions of [Public Officers Law] section 30 irrespective of the domicile or residency of his family and irrespective of the fact that he may have more than one residence". In order to warrant the granting of such declaratory relief, it must appear that the defendants have taken the position that a firefighter may not be in compliance with [Public Officers Law § 30 unless he or she resides with his or her family and unless he or she maintains only one residence. Since the defendants have not taken such a position, but instead acknowledge that a firefighter may be in compliance with the residency law, even though he or she maintains more than one residence, or lives apart from his or her family, no actual controversy exists. Where there is no genuine dispute

between the parties, the courts are precluded, as a matter of law, from issuing a declaratory judgment (see, State Farm Fire & Cas. Co. v. Limauro, 103 AD2d 514, 517-518, affd 65 NY2d 369; Combustion Eng. v. Travelers Ind. Co., 75 AD2d 777, 778-779, affd 53 NY2d 875).

The defendant Joseph Spinnato, in an affidavit submitted in support of the defendants' motion to dismiss (CPLR 3211[a][7]), admitted that the fire department in April of 1986 issued Orders No. 41 and 46, pursuant to which firefighters thought to be in violation of the residency law were notified that their families would be required to move to a residence within the lawful counties "unless, as a result of special circumstances, the member legitimately resides at a domicile different from that

of his or her family". Since the record contains no indication as to what circumstances would be considered by the defendants as sufficiently "special" to dispel the natural inference that a married person would be more likely to maintain a principal residence with his or her family than apart from it, there is no way of assessing exactly what degree of conclusiveness the defendants will attribute to such a presumption. It is clear, however, that the presumption that an individual resides with his or her family is not considered irrebuttable, because a provision for a "special circumstances" exception is made. Thus, there is no merit to the allegation contained in the plaintiffs' complaint that the two orders "implicitly [include] a pre-determined and conclusive finding, ruling,

and an irrebuttable presumption by the defendants that a fireman may not be an inhabitant and/or domiciliary of a lawful county if 'his or her family' resides outside the State" The plaintiffs offer nothing to counter Mr. Spinnato's sworn statement that "[i]t is not and has not been the policy of the Fire Department to irrebuttably presume that a member lives outside the State of New York if his family does so". This assertion has been repeated by the defendants' attorneys in open court.

SUPREME COURT QUEENS COUNTY
IA FORM PART 12
----------x
ERNEST WINKLER, et al. BY Bambrick, J.

VS.

DATED
July 9, 1987

JOSEPH E. SPINNATO, etc.,
et al.
----------x

This is a declaratory judgment action challenging the constitutionality of Public Officers Law 3(19) and 30(5-a) (hereinafter "the amendments") which, respectively, requires a public officer residing outside New York State to move within one of the counties designated by law within one year from the effective date of the subdivision and permits a public officer currently residing outside one of the lawful counties to remain so domiciled. Defendants cross-move to dismiss on the ground that the complaint fails to state a cause of action.

Defendants' cross motion is denied inasmuch as plaintiffs have set forth a valid cause of action pursuant to CPLR 3001. The court will proceed to decide this matter on the merits.

The challenge is based upon the privileges and immunities clause of Article IV, section 2, of the United States Constitution, the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution, and the due process and equal protection clause of the New York State Constitution. Although the amendments apply to all public officers, the plaintiffs herein are firemen employed by the City of New York.

In support of the action, plaintiffs maintain that the amendments unlawfully discriminate between residents and non-

residents of New York State and that the amendments create irrebuttable presumptions that firemen who reside outside the State and are not as efficient as resident firemen and that the residence of a fireman's family is the same as that of the fireman. Plaintiffs do not contest the validity of the residency requirements themselves.

Public officers of the State of New York have been required to be residents of the State since 1829 (Revised Statutes of the State of New York, title 6, chapter 5, § 1 [1829]). Public officers of local governments have been required to be residents of the locality by which they are employed since 1829 (Laws of the State of New York, chapter 7, Art 1, § 3 [1829]). In 1962, the legislature extended the residency requirements of New York City

public officers by permitting them to live as well in six nearby New York counties. Plaintiffs herein, as well as all New York City public officers, are informed of the residency requirements when they apply for employment, at the time that they accept employment, and periodically thereafter. Although it is uncontested that the City of New York has been lax in enforcing the residency requirements, it is clear that the City had the right, at any time, to terminate the employment of any public officer found to have violated the residency requirements after an investigation by the Inspector General.

The court recognizes, at the outset, that a strong presumption of constitutionality attaches to all legislative enactments which can only be rebutted by a demonstration of

unconstitutionality beyond any reasonable doubt. (Lighthouse Shores, Inc. v. Town of Islip, 41 NY2d 7; Matter of Van Berkel v. Power, 16 NY2d 37.) It is also presumed that the legislature has investigated thoroughly the situation sought to be covered by the enactments, has discovered the need for the enactments, and has considered alternate proposals to the enactments. (McGowan v. Maryland, 366 US 420.) If any state of facts exists which justify the challenged enactments and the enactments are neither arbitrary nor capricious, the court's inquiry must end. (McDonald v. Board of Election Commissioners of Chicago, 394 US 802.) The wisdom and desirability of the enactments are not before the court for review for this would be an unwarranted intrusion into the legislative branch of government.

(Maresca v. Cuomo, 64 NY2d 242; Matter of Tolub v. Evans, 58 NY2d 1; Board of Education v. Nyquist, 57 NY2d 27.)

The court also notes that, although New York State has chosen to extend constitutional protections beyond the standards set by the Federal Constitution in certain instances (People v. P.J. Video, Inc., 68 NY2d 296; Cooper v. Morin, 49 NY2d 69), the interpretation of the equal protection and due process clause of the Fourteenth Amendment to the United States Constitution pertaining to the issues involved herein are equally applicable to the equal protection and due process clause of the New York State Constitution. (Cooper v. Morin, supra; Sinhogar v. Parry, 74 AD2d 204, affd 53 NY2d 424.) Applying the above standards of review to the action

herein, the court determines that the challenged amendments are constitutional.

Plaintiffs' first argument that the amendments violate the privileges and immunities clause of the United States Constitution is without merit. The clause was originally enacted to convert thirteen sovereign economic entities into a national economic union by proscribing state discrimination against a non-resident of that state. (Baldwin v. Fish and Game Commission of Montana, 436 US 371.) Thus, any state enactment which draws distinctions between state residents and non-state residents and is challenged pursuant to the privileges and immunities clause is reviewed to determine whether the distinctions deny to the non-resident a fundamental or protected interest and, if it does, whether it is sufficiently

justified nevertheless. (United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 US 208; Baldwin v. Fish and Game Commission of Montana, supra.)

In the matter herein, since the court determines that the non-resident plaintiffs affected by the amendments do not have a fundamental interest in being employed by New York City as firemen nor to live where they choose, the privileges and immunities clause is inapplicable and the second step of the analysis need not be undertaken. (Massachusetts Board of Retirement v. Murgia, 427 US 307; McCarthy v. Philadelphia Civil Service Commission, 424 US 645.)

There is no fundamental right to serve as a public employee of a particular state,

much less as a public officer of a particular state. (Massachusetts Board of Retirement v. Murgia, supra; Palmer v. Ticcione, 433 F Supp 653, affd 576 F2d 459.) State residency requirements for public officers have been held to be constitutional as is evidenced by the fact that New York State's residency requirements have been in effect since 1829. (McCarthy v. Philadelphia Civil Service Commission, supra; Lorenz v. Logue, 611 F2d 421; Woods v. City of New York, 129 Misc 2d 851, affd 119 AD2d 469, affd 69 NY2d 771.) It has long been held that public officers fulfill "a most fundamental obligation of government to its constituency" (Foley v. Connelie, 435 US 291, 297) and, therefore, can be distinguished from public employees or individuals engaged in private occupations.

Employment as a public officer involves a particularly strong nexus with the state and local governments not typical of routine public employment or private occupations. (Ambach v. Norwick, 441 US 68.)

Furthermore, public officers do not affect the ideal of a "national economic union" (see Supreme Court of New Hampshire v. Piper, 470 US 274; Toomer v. Witsell, 334 US 385) since their work specifically benefits the residents of a particular state and they are hired, trained, supervised and paid at the expense of the taxpayers of the state in which they are employed. Finally, there is no fundamental interest for a public officer to live where he or she chooses since state residency requirements are clearly constitutional.

Plaintiffs' second arguments that the amendments violate plaintiffs' right to equal protection under the United States and New York State Constitutions must likewise fail. Under traditional equal protection principles, a state had the discretion and the authority to statutorily classify its citizens. (See Graham v. Richardson, 403 US 365.) If the classification involves an inherently suspect class, such as classifications based on race, nationality, or alienage, the court will strictly scrutinize the challenged enactment under the compelling state interest test. If not, the classification must pass constitutional muster under a rational basis standard of review. Here, there are no allegations that public officers constitute a suspect class and, therefore, the appropriate

standard of review of the challenged amendments is the rational basis test. (Vance v. Bradley, 440 US 93; McDonald v. Board of Election Commissioners of Chicago, 394 US 802; People v. Liberta, 64 NY2d 152; People v. Drayton, 39 NY2d 580.)

As was noted previously, public officers have had to reside within the State of New York since 1829 and within one of the eleven lawful counties since 1962. Geographical distinctions do not automatically violate equal protection. (Weissman v. Evans, 56 NY2d 458.) The amendments reflect a legislative concern that, if the employment of all the firemen who have violated the residency requirements were terminated, New York City would be faced with a serious shortage of skilled and experienced firemen. The decision to forgive the New York State

resident firemen residing outside the lawful counties but not the out-of-state firemen was based on the belief that out-of-staters could not have the loyalty, sense of accountability, and identity with the state and municipality that resident firemen had and, therefore, could not benefit the people of New York State in the same manner. It has also been argued by defendants that by residing within the State, public officers would spend their wages here, returning an economic benefit to those whose tax contributions pay the firemen's salaries. The amendments can easily be viewed as addressing themselves to that part of the violation of the residency requirements problem which seemed most serious.

Plaintiffs' contention that in some instances out-of-state firemen reside

geographically closer to New York City than firefighters outside the lawful counties is not dispositive. State residency is required, state lines are not drawn with mathematical precision, and state boundaries are inviolate under our Federal form of government. (Supreme Court of New Hampshire v. Piper, 470 US 274.)

Plaintiffs' further argument that the amendments represent an incorrect irrebuttable presumption that non-resident firemen are not as efficient as resident firemen is equally unavailing. There is no indication that this presumption was on the legislative mind when the amendments were enacted and the contrary is borne out by the granting of a one-year grace period for the out-of-state firemen to move into one of the lawful counties. This grace period can only reflect a legislative

determination to retain the services of its non-resident firemen. Moreover, the irrebuttable presumption doctrine has been limited to those cases involving suspect classifications or fundamental interests, neither of which is present in this case. (Frontiero v. Richardson, 411 US 677.) In any event, it is not the court's function to decide whether the classifications the legislators selected were unwise.

Plaintiffs' third argument that plaintiffs' due process guarantees are violated by the administration of the amendments in that the residence of a fireman's family is presumed to be the residence of the fireman is not borne out by the facts. The parties have not fully briefed the court as to the procedures to be followed if a fireman maintains that he or she is lawfully domiciled in a lawful

county although his or her family is domiciled elsewhere. Suffice it to say that defendants have indicated that said individual is given notice and an opportunity to be heard and that such individual would not be automatically terminated at the end of the grace period without a thorough investigation. At the end of such investigation, if the individual was to be terminated, he or she would have recourse to the courts for review of the administrative procedure. Since that situation has not yet occurred to any of the plaintiffs herein and the presumption has been vigorously denied, the Court cannot find any due process violations.

Finally, plaintiffs have speculated at length about the political motives of enacting the "forgiveness" amendments and

for enforcing the residency requirements at all. Plaintiffs' speculations have no bearing on the court's limited power of review. As discussed earlier in the opinion, plaintiffs' concerns should be articulated to the legislature and at the ballot box. (See Noble State Bank v. Haskell, 219 US 575; Maresca v. Cuomo, 64 NY2d 242.)

All other arguments raised by plaintiffs and not specifically covered by this decision have been considered by the court and determined to be without merit.

Accordingly, the relief by plaintiffs is denied. Defendants are granted judgment pursuant to CPLR 212[b]. It is hereby declared that the challenged amendments to the Public Officers Law are constitutional. settle order under which shall include the terms of the stipulation between the

parties, dated July 2, 1987, inter alia adding Victor Armaniaco as a party plaintiff.

s/E.P. Bambrick
J.S.C.

STATE OF NEW YORK
COURT OF APPEALS

---

2 No. 303
Ernest Winkler, et al.,
Appellants,
v.
Joseph E. Spinnato, &c., et al.,
Respondents,
The State of New York,
Intervenor-Respondent.

NOTICE OF APPEAL

Queens County Index No. 4177/87

PLEASE TAKE NOTICE, that the above named plaintiffs hereby appeal to The Supreme Court of the United States from the order of The State of New York Court of Appeals, entered in the offices of clerk of said Court on October 20, 1988, and from each and every part thereof. This appeal is taken pursuant to 28 U.S.C. 1257(2).

Dated: Rego Park, New York
November 8, 1988

Yours, etc.

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STATE OF NEW YORK)
ss.
COUNTY OF QUEENS)

E. ALEX BROWER, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in Briarwood, New York.

On November 9, 1988 I served a true copy of the annexed Notice of Appeal by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service with the State of New York, addressed to the last known address of the addressees as indicated below:

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ROBERT ABRAMS
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s/_____
E. ALEX BROWER

Sworn to before me this 9th
day of November, 1988.

s/_____

(2)

FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1187

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ERNEST WINKLER, RAYMOND J. ASARO, FRANCIS, E. BAKER, RALPH N. CAPASSO, DAVID CLEARY, GERARD F. CONDON, LAURANCE CONTI, JAMES CUMMINS, JOHN P. DEVANEY, ROBERT DORRITIE, WILLIAM J. DOVENERO, DAVID P. DRURY, BRUCE W. ERICKSON, MICHAEL FIORILLO, HERBERT C. FISCHER, THOMAS E. FLYNN, MICHAEL P. FRISCH, HENRY W. FUHRMAN, AARON GRABER, FRANK GUSTAR HENKEL,

(caption continued on next page)

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Appellants,

vs.

JOSEPH E. SPINNATO, individually and as Commissioner of the Fire Department of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

For well over a century, New York has required public officers to be residents of the State. Public officers of local governments have also been required to be residents of the locality by which they are employed. In 1986, amendments to the residency law were passed as a form of amnesty for certain public officers who had been violating these residency requirements. These amendments exempt certain public officers living within the State from the local residency requirements for as long as they remain at their current residency, while requiring those living outside New York State to comply with both State and local residency requirements within one year.

1. Are the constitutional rights of the public officers residing out-of-state in violation of the residency requirements abridged by this statutory scheme under

either the Equal Protection Clause or the Privileges and Immunities Clause of the U.S. Constitution?

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PURSUANT TO 28 U.S.C.§1257(a), AS AMENDED, AN APPEAL TO THIS COURT DOES NOT LIE. THE INSTANT APPEAL SHOULD THEREFORE BE DISMISSED.	
IF TREATED AS A PETITION FOR A WRIT OF CERTIORARI, THE WRIT SHOULD BE DENIED. THE NEW YORK COURT OF APPEALS PROPERLY HELD THAT SECTIONS 3(19) AND 30(5-a) OF THE PUBLIC OFFICERS LAW, WHICH CREATE A DISTINCTION BETWEEN FIREFIGHTERS WHO HAVE VIOLATED ONLY LOCAL RESIDENCY REQUIREMENTS AND	

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THOSE WHO HAVE VIOLATED BOTH LOCAL AND STATE RESIDENCY REQUIREMENTS, ARE CONSTITUTIONAL UNDER BOTH THE EQUAL PROTECTION AND PRIVILEGES AND IMMUNITIES CLAUSES OF THE U.S. CONSTITUTION. IN SO HOLDING, THE COURT OF APPEALS FOLLOWED APPLICABLE DECISIONS IN THIS COURT. 23

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No. 88-1187

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ERNEST WINKLER, RAYMOND J. ASARO, FRANCIS, E. BAKER, RALPH N. CAPASSO, DAVID CLEARY, GERARD F. CONDON, LAURANCE CONTI, JAMES CUMMINS, JOHN P. DEVANEY, ROBERT DORRITIE, WILLIAM J. DOVENERO, DAVID P. DRURY, BRUCE W. ERICKSON, MICHAEL FIORILLO, HERBERT C. FISCHER, THOMAS E. FLYNN, MICHAEL P. FRISCH, HENRY W. FUHRMAN, AARON GRABER, FRANK GUSTAR HENKEL, JR., STANLEY D. JESSAMINE, JR., DENNIS KEATING, KIRK A. KOWALCHUK, PETER L. LAUDATI, JOSEPH LIOTTI, PETER P. LORENZO, NEAL M. McKENNA, RICHARD J. MARUCHEAU, ARTHUR MESSINGER, JOHN J. MORAN, WILLIAM R. MURPHY, THOMAS

(caption continued on next page)

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

MURRAY, WARREN A. NAGLE, JOHN OEHM, JAMES A. OPALECKY, ANTHONY ORSANO, ROBERT PESCE, KENNETH J. PISCOPO, RICHARD PLOUFF, MICHAEL REHBERG, WILLAIM H. RITCHIE, ROBERT G. SCHILDHORN, C. BENJAMIN STIVALA, ERIK WIENER, FRED C. ZERELLI, and others similarly situated,

Appellants,

vs.

JOSEPH E. SPINNATO, individually and as Commissioner of the Fire Department of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

STATEMENT

Appellees, the Commissioner of the Fire Department of the City of New York, the Mayor of the City of New York, the Fire Department of the City of New York and the City of New York ("municipal defendants"), move to dismiss the appeal or, alternatively, to affirm the final order of the Court of Appeals of the State of New York, entered

October 20, 1988, on the grounds that the appeal is not within this Court's jurisdiction and does not present a substantial constitutional question.[1] If treated as a petition for a writ of certiorari, for the reasons set forth below, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

(1)

In this action, plaintiffs, 46 individual firefighters employed by the City of New York and who live outside the State of New

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[1] 28 U.S.C. §1257, amended on June 27, 1988 to be effective 90 days later, now provides that final judgments or decrees rendered by the highest court of the State, where the validity of a state statute is drawn in question as being repugnant to the Constitution, may be reviewed by this Court only by writ of certiorari. Since the effective date of the amendment, September 25, 1988, was before the Court of Appeals issued its decision in this case on October 20, 1988, the amendment governs and an appeal to this Court does not lie. See Pub. L. 100-352, §§3, 7.

York, sought a declaration that sections 3(19) and 30(5-a) of the Public Officers Law (McKinney 1988) are unconstitutional. The Public Officers Law sets forth State and local residency requirements for public officers. The challenged sections, amendments to the residency laws, exempted certain public officers living within the State from the local residency requirements for as long as they maintain their current residence, while exempting those living outside New York State from the local and State residency requirements for one year.

The Supreme Court, Queens County (Bambrick, J.), held that the challenged amendments were constitutional and granted summary judgment to defendants. A judgment to that effect was entered on or about August 18, 1987. The Appellate Division, Second Department, by order entered December 28, 1987, modified the

judgment appealed from by adding a provision declaring that Public Officers Law §§3(1a) and 30(5-a) are constitutional as applied to the plaintiffs and, as so modified, affirmed. On October 20, 1988, the Court of Appeals, with one judge dissenting, affirmed, holding that the State of New York may constitutionally draw a distinction between firefighters who have violated only local residency requirements and those who have violated both local and State residency requirements, and that such distinction violates neither the Equal Protection Clause or the Privileges and Immunities Clause of the U.S. Constitution.

(2)

Public officers of the State of New York have been required to be residents of the State since as early as 1829. Revised Statutes of the State of New York, Part I, Ch. V, title 6, §1 (1st ed. 1829). There is

also a nearly century-old requirement that those who serve as public officers of local governments be residents of the locality as well as the State. L. 1892, c. 681, §§3 and 20.

Apart from express statutory exception, the law currently provides that:

> No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, ... be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen ... or within which his official functions are required to be exercised .... N.Y. Public Officers Law §3(1) (McKinney 1988).

Pursuant to section 30(1)(d) of the Public Officers Law, a public office is deemed vacant when the incumbent ceases to be an inhabitant of New York State or of the political subdivision or municipal corporation of which the officer was required to be a resident when chosen.

In 1962, the Legislature liberalized the local residency requirements to permit New York City police officers, correction officers and firefighters to live outside of the five New York City counties in six nearby counties: Nassau, Suffolk, Westchester, Rockland, Putnam and Orange Counties. N.Y. Public Officers Law §§3(2), (9) and 30(4), (5). (McKinney 1988). The exemptions applicable to New York City firefighters are contained in N.Y. Public Officers Law §3(a), which provides that:

> a. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation of the State for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a paid member of the uniformed force of a paid fire department ... of an City over one million population who resides (a) in the County in which such city is located; or (b) in a county within the state contiguous to the

> county in which said City is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city.

Applicants for employment as New York City firefighters are notified of the residency requirements when they apply, when they accept employment, and periodically thereafter.

After it became evident that some New York City firefighters were violating the requirements of Public Officers Law §§3 and 30(5), the New York City Fire Department issued a series of orders (Order No. 41 dated April 2, 1986, and Order No. 46, dated April 11, 1986) pursuant to which all firefighters who believed themselves to be in violation of the residency laws were required to so notify the Inspector General, move into a lawful county by May 30, 1986, and have their families move into a lawful county by September 1, 1986, unless, "as a result of

special circumstances, the member legitimately resides at a domicile different from that of his or her family."

Effective July 22, 1986, the State Legislature amended Public Officers Law §§3 and 30 as a form of amnesty to residency - law violators. Specifically, the Legislature added subdivision 19 to Public Officers Law §3, and also added subdivision 5-a to Public Officers Law §30 (L. 1986, ch. 509, §1, 2). Public Officers Law §3(19) provides as follows:

> Any person who resides in this state and who is currently employed as a member of the police force, a paid member of the uniformed force of a paid fire department or department of corrections in the correctional service classification of the classified civil service, of a city of over one million population, shall be exempt from the provisions of subdivisions one, two and nine of this section upon compliance with the procedure set forth in this subdivision. Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in

> writing of said intention within thirty days from the effective date of this subdivision and shall specify his then current residence address. The exemption created by this subdivision shall be applicable only to said actual designated residence and not to any residence that any subject currently employed member may there after establish; provided, however, that any such currently employed member who resides outside this state shall have one year from the effective date of this subdivision within which to establish residence as required pursuant to subdivisions one, two and nine of this section and comply with the notice requirements of this subdivision. Said residence shall constitute a lawful residence for all purposes notwithstanding any provision to the contrary of any general, special or local law, charter, code, ordinance, resolution, rule or regulation.

Public Officers Law §30 (5-a) contains a parallel provision.

One hundred four (104) firefighters notified the Fire Department that, as of July 22, 1986, they resided at addresses within New York State but outside the 11 lawful counties. The Fire Department was notified

by 141 firefighters that they resided in New Jersey, Pennsylvania and Connecticut as of July 22, 1986. The plaintiffs in the instant case are among this group.

(3)

The instant action was commenced with the service of a summons and complaint on behalf of 45 plaintiffs on or about December 18, 1986. The complaint alleged violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of Article I, Section 6 of the New York State Constitution.[2] Issue was joined with service of a verified answer dated January 7, 1987. The State of New York intervened. See Executive Law, §71.

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[2]Plaintiffs' due process claims have since been abandoned.

In March 1987, plaintiffs, by order to show cause, moved for summary judgment. Municipal defendants cross-moved to dismiss the complaint by notice of cross-motion dated April 23, 1987.

In May 1987, while these motions were pending, plaintiffs sought, by order to show cause, to amend their complaint to include claims that the challenged amendments violated the Privileges and Immunities Clause of Article IV of the United States Constitution and the Equal Protection Clause of Article I, Section 11 of the New York State Constitution. Defendants consented to this amendment.

In this action, plaintiffs challenge the amendments to the Public Officers Law on the ground that the amendments contain a distinction between two classes of residency law violators based solely upon the criterion of State residence. They challenge the

constitutionality only of the amendments, not the residency requirements per se.

OPINIONS BELOW

Supreme Court Opinion

The Supreme Court, Queens County (Bambrick, J.), held that the challenged amendments were constitutional. Therefore, the Court denied summary judgment to plaintiffs and, pursuant to CPLR 3212(b), granted summary judgment to defendants. A judgment to that effect was entered August 18, 1987.

After first observing that a strong presumption of constitutionality attaches to legislative enactments, the Court addressed plaintiffs' claims under the Privileges and Immunities Clause. The Court determined that plaintiffs had neither a fundamental right to be employed by New York City nor a fundamental right to live where they chose while being so employed. Moreover, the

Court found that residency requirements for public officers do not contravene the "national economic union" sought to be protected by the Privileges and Immunities Clause, since the work of public officers is specifically intended to benefit the citizens of the State where they are hired, trained and employed at the expense of State taxpayers.

The Court found that the New York State and United States Constitutions set forth the same standards of review to be applied to the equal protection and due process claims in this case. Applying those standards, the Court held that the challenged amendments again passed constitutional muster.

Since plaintiffs did not allege that they were a suspect class, the Court held that their classification in the challenged amendments need only be rationally based to

be constitutional. The Court found that the distinction in the amendments between resident and nonresident firefighters could have been rationally based on a desire to spare New York City a shortage of skilled and experienced firefighters, a belief that resident firefighters would feel more loyalty and identity with New York State or a belief that resident firefighters would spend their wages within the State, returning an economic benefit to the State.

The Court found plaintiffs' other contentions to be likewise without merit.

Appellate Division Opinion

134 A.D.2d 66, 523 N.Y.S.2d 530

The Appellate Division, Second Department, in an opinion by the Honorable Lawrence J. Bracken, held that Public Officers Law §§3(19) and 30(5-a) were constitutional as applied to plaintiffs. The

Court modified the judgment below to so declare.

In passing on plaintiffs' equal protection claim, the Appellate Division found no authority for the contention that plaintiffs constituted a suspect class and that the challenged amendments ought to be subjected to "strict scrutiny". Therefore, the Court looked to see whether there was a "rational basis" for the amendments.

Assuming for purposes of the appeal the validity of the original State residency requirements contained in the Public Officers Law, the Court held that the challenged amendments could not be upheld on the grounds that they sought to promote a knowledge of, or a sense of loyalty to, the community since "the distinction is between two classes of persons, none of whom reside within the community in which they are employed (New York City)". However, the

Court held that "the State may classify employees and the employees of its political subdivisions so as to encourage residence inside the State for any valid reason, including the obvious financial one". Since there was a rational basis for the amendments, justifying the preference given to firefighters who continued to reside within New York State, the amendments comported with principles of equal protection.

The Appellate Division also rejected plaintiffs' contention that the challenged amendments violated the Privileges and Immunities Clause of the United States Constitution. The Court noted that it was "overly simplistic" to suggest that the Privileges and Immunities Clause prohibited "all forms of discrimination based on state residence" and held that local public employment was not a privilege which bears on the vitality of the Nation as a single

entity. The Court acknowledged the "clear implication" of recent United States Supreme Court opinions that purely public offices might be reserved to State residents consistent with the Privileges and Immunities Clause. The Court also reasoned that, to hold otherwise, would exalt one interest protected by the Constitution, the encouragement of economic harmony between States, to the exclusion of an even more basic constitutional value, that of individual State sovereignty.

Court of Appeals Opinion

72 N.Y.2d 402, 532 N.Y.S.2d 759 (1988)

(1)

The New York Court of Appeals, one judge dissenting, affirmed. The Court held that "the State of New York may constitutionally draw a distinction between firefighters who have violated only local residency requirements and those who have

violated both local and State residency requirements."

Rejecting plaintiffs' argument based on the Privileges and Immunities Clause, the Court held that plaintiffs had no "fundamental right" protected by that Clause to be employed as New York City firefighters since public employment is not a "privilege which bear[s] upon the vitality of the Nation as a single entity" [citation omitted].

The Court likewise rejected plaintiffs claim under the Equal Protection Clause of both the Federal and State Constitutions. The Court determined that since plaintiffs are not a suspect class and there is no fundamental right to government employment for purposes of the Equal Protection Clause, the amendments must be upheld so long as they are "based upon some conceivable and legitimate State interest" [citations omitted]. Applying this test, the Court held the

State's distinction between those officers who violated both State and local residency requirements and those who violated only the local requirements was rationally based, reasoning as follows (72 NY2d at 406-407):

> The State's longstanding interest in requiring its public officers to be State residents is understandable. It is without doubt that "public employees who reside in New York are more likely, as a class, to spend their money in New York" (134 AD2d 66, 75), thereby returning an economic benefit to the society from whose public fisc the officer's salaries are paid. In addition, State residents contribute more taxes to the State and its municipalities than do nonresidents who merely work within the State. Moreover, State residency requirements are premised on the belief that out-of-state residents do not have the same loyalty and commitment to the State as in-state residents. Like all public employees, those receiving amnesty must be State residents. The State has, however, subordinated its local interest to a limited degree, to accommodate those in violation. In order to comply with the State residency requirement, out-of-state residents must move; in-state residents, obviously, need not. Because out-of-state residents are

> already required to move, there is little reason to excuse them from moving into one of the lawfully designated counties. Because, on the other hand, in-state residents need not otherwise move, they are not being required to do so for the sole purpose of moving into a lawful county. But if the move from their current in-state residence, however, they, like out-of-state residents, must do so in compliance with the local residence law. This limited accommodation to those who already satisfy the State residency requirement and, therefore, do not have to move for that purpose, is rational and does not violate equal protection.

(2)

Judge Alexander dissented. While acknowledging that a State has a legitimate interest in requiring its public officers to be State residents since State residency requirements benefit the State financially and, in the case of firefighters, encourage public employees skilled in emergency rescue services to spend more time within the State, he noted that this State interest is advanced by requiring firefighters to live in the

State, not by requiring that the firefighters live in any particular counties within the State. Also recognizing that while the lawful counties have a legitimate interest in requiring New York City firefighters to reside there, he concluded that that interest is not rationally served by imposing the local residency requirement on only some New York City firefighters. Thus, he would have sustained the constitutionality of the amendments if they required the out-of-state firefighters to move into the State or if they required all New York City firefighters to move into a lawful county. However, he found that neither the State nor the local interest was rationally served by requiring only the out-of-state firefighters to move into the lawful counties and thus violated the equal protection clauses of the Federal and State Constitutions.

ARGUMENT

PURSUANT TO 28 U.S.C. §1257(a), AS AMENDED, AN APPEAL TO THIS COURT DOES NOT LIE. THE INSTANT APPEAL SHOULD THEREFORE BE DISMISSED.

IF TREATED AS A PETITION FOR A WRIT OF CERTIORARI, THE WRIT SHOULD BE DENIED. THE NEW YORK COURT OF APPEALS PROPERLY HELD THAT SECTIONS 3(19) and 30(5-a) OF THE PUBLIC OFFICERS LAW, WHICH CREATE A DISTINCTION BETWEEN FIREFIGHTERS WHO HAVE VIOLATED ONLY LOCAL RESIDENCY REQUIREMENTS AND THOSE WHO HAVE VIOLATED BOTH LOCAL AND STATE RESIDENCY REQUIREMENTS, ARE CONSTITUTIONAL UNDER BOTH THE EQUAL PROTECTION AND PRIVILEGES AND IMMUNITIES CLAUSES OF THE U.S. CONSTITUTION. IN SO HOLDING, THE COURT OF APPEALS FOLLOWED APPLICABLE DECISIONS IN THIS COURT.

I.

Plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257, contending that the appeal draws into question the constitutionality of the 1986

amendments to the New York State Public Officers Law. Juris. Statement at 3. As indicated, supra, at p. 3, n. 1, the recent amendment to 28 U.S.C. §1257, which governs in the instant case, now provides for such review only by writ of certiorari. See Pub. L. 100-352. The appeal, therefore, must be dismissed. If treated as a petition for writ of certiorari, for the reasons that follow, the petition should be denied.

II.

A. **The challenged amendments to the Public Officers Law do not deny plaintiffs the equal protection of the laws.**

(1)

The Equal Protection Clauses of the United States and New York State Constitutions permit the State to exercise considerable discretion in enacting laws which affect some groups differently than others. See McGowan v. Maryland, 366 U.S.

420, 425-26 (1961); Lighthouse Shores, Inc. v. Town of Islip, supra, 41 N.Y.2d at 13. Strict scrutiny will be applied to legislative enactments only when the statutory classification interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, for example, alienage, race - or ancestry. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

No fundamental right or suspect class is involved here. This Court has explicitly held that there is "no fundamental right to government employment for purposes of the Equal Protection Clause." United Building and Construction Trades Council of Camden County v. Mayor and Council of the City of Camden, 465 U.S. 208, 219 (1984) (hereinafter "Camden"); see Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. at 313. And plaintiffs, nonresident

public employees, are not a suspect class. See Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. at 312; San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973)[3] Therefore, the rational basis test, not strict scrutiny, should be applied to plaintiffs' equal protection claims. Vance v. Bradley, 440 U.S. 93, 96-97 (1970); McDonald v. Board of Election Commissioners, 394 U.S. at 806, 807 (1969).

(2)

In applying this test, one looks to see whether the distinctions drawn by the challenged amendments bear a rational

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[3]The only case plaintiffs cite for the novel proposition that public employees constitute a "suspect class" is C.D.R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (E.D.N.Y. 1976), aff'd, 429 U.S. 103 (1977) (Juris. Statement at 53-55). However, it is clear that the suspect class referred to therein is that of resident aliens, not public employees. Id. at 1168-69. It is thus wholly inapposite.

relationship to a legitimate State interest. See McDonald v. Board of Election Commissioners, supra, 394 U.S. at 809. Statutory classifications will be set aside only if no state of facts reasonably may be conceived to justify them. Id. at 808-09. Moreover, the legitimate purpose justifying a statutory provision need not be the primary purpose of the provisions. McGinnis v. Royster, 410 U.S. 263, 270 (1973); Maresca v. Cuomo, 64 N.Y.2d 242, 252, app. dism. for want of a substantial federal question, 474 U.S. 802 (1985). A court may even hypothesize the motivations of the State Legislature to discern any conceivable legitimate objective. See Weinberger v. Salfi, 422 U.S. 749, 780 (1975); McGee v. Korman, supra, 70 NY2d at 231; Maresca v. Cuomo, supra, 64 NY2d at 251.

There are three separate and independently adequate rational bases for

New York State's requirement that, while certain New York City firefighters may continue to reside outside the eleven lawful counties, all firefighters must reside in the State.

First, New York has a legitimate interest in promoting the economic welfare of the State. As properly found by the Court of Appeals, "it is without doubt that 'public employees who reside in New York are more likely, as a class, to spend their money in New York' thereby returning an economic benefit to the society from whose public fisc the officers' salaries are paid." 72 NY2d at 406. In addition, New York residents contribute more taxes to the State and its municipalities than nonresidents who merely work within the State.

Second, State residency requirements are premised on the belief that out-of-state residents do not have the same loyalty and

commitment to the State as in-state residents. State residency promotes among public officers a sense of accountability and identity with the State and its communities. It has long been recognized that public officers are empowered to exercise the sovereign power of the State for the benefit of the public. See, e.g., Foley v. Connelie, 435 U.S. 291, 297 (1978). The Legislature has deemed it preferable, therefore, that public officers be State citizens. Moreover, it has long been held that " '[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' " Sugarman v. Dougall, 413 U.S. 634, 647 (1972) (quoting Boyd v. Thayer, 143 U.S. 135, 161 (1892). The Legislature is entitled to require that officers be State residents so that they may take part in its political activity and help to define the

values of that polity. See Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (States may require that only bona fide residents may vote).

Lastly, the State has a legitimate interest in promoting the welfare of its citizens. Local police officers, correction officers and firefighters are professionally trained, at the expense of the State and local governments, to protect public health and safety. And, as was recognized in Martinez v. Bynum, 461 U.S. 321, 328-29 (1983), there is a "substantial state interest in assuring that services provided for its residents are enjoyed only by residents." The Legislature could rationally conclude that requiring public officers to live within the State would increase the amount of time they spend within the State, and would therefore make them available to benefit the residents of the State in the course of their

daily lives. In the case of firefighters, who have specialized training in skills such as crowd control, resuscitative techniques and rescue operations, there is a substantial state interest in having those public officers present within the State on an ongoing basis, not just when they are on duty.

It is immaterial that each of these grounds also provides a rational basis for requiring New York City residency. Each ground is rationally related to State residency purposes as well. The Legislature is permitted to adopt State residency requirements for public officers without also requiring municipal residency. When the Legislature, in the challenged amendments, opted to forgive residency violations, the Equal Protection Clause demanded only that there be a rational basis for distinguishing between resident public officers and those residing outside the State. The Legislature

could rationally have concluded that while it was willing to give up the benefits accruing to localities and to local residents under the residency laws, it was not willing to forego those same advantages insofar as they benefit the State and its residents.

(3)

The Court of Appeals decision, upholding the validity of the challenged amendments against plaintiffs' equal protection challenge, is fully consistent with applicable decisions in this Court. This Court has explicitly held that bona fide residency requirements for public officers violate neither the right to travel nor the Equal Protection Clause of the Constitution. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 645-46, 647 (1976). In McCarthy, a firefighter with the Philadelphia Fire Department lost his job when he moved to New Jersey in

contravention of a municipal regulation that required him to reside in Philadelphia. Id. at 645. This Court noted that a public agency's relationship with its own employees may justify greater control than over the citizenry at large. Id. at 646, n.6. The Court characterized plaintiff's claim as asserting "a constitutional right to be employed by the city of Philadelphia while ... living elsewhere" and held that there was "no support in our cases for such a claim." Id. at 646-47 (emphasis omitted).

The Court also noted that residency requirements for public officers do not contravene the Equal Protection Clause or the Due Process Clause of the United States Constitution. Writing in McCarthy, this Court discussed its determination in another residency case (424 U.S. at 645-46):

> The Michigan Supreme Court held that Detroit's [residency] requirement for police officers was not irrational and did not violate

> the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. We dismissed the appeal from that judgment because no substantial federal question was presented. Detroit Police Officers Assn. v. City of Detroit, 405 US 950 (1972). We have therefore held that this kind of ordinance is not irrational. (footnote and citations omitted)

In the face of this authority, plaintiffs eschew making any claim that New York's State and local residency requirements are unconstitutional. Yet the essence of plaintiffs' claim is that they have a constitutional right to remain employed by the City of New York while living out of State. Cf. McCarthy v. Philadelphia Civil Service Commission, supra, 424 U.S. at 646-47. That contention strikes at the heart of any State residency requirement and there is no support in law for such a claim. See id. at 647. If a State does not violate the Constitution by adopting a State or local residency requirement for its public officers

in the first place, it is unclear how the challenged amendments, which merely continue the requirement of State residence for public officers, can be deemed to run afoul of Constitutional guarantees.

Plaintiffs' reliance (Juris. Statement at 46-50) on Attorney-General of New York v. Soto-Lopez, 476 U.S. 898 (1986), is misplaced. In Soto-Lopez, the plaintiffs challenged a New York statute which granted a civil service preference to veterans who had been residents of New York State at the time they entered the armed forces. A plurality of this Court struck down the provision on both "right to travel" and "equal protection" grounds. Id. at 911. The Court reasoned that the statutory classification penalized plaintiffs for having exercised their right to travel and found that each of the State's asserted interests could be fully promoted by granting bonus

credits to all qualified veterans, not just those who had resided in New York at the time of their induction. Id. at 909. Soto-Lopez thus dealt with a requirement of prior residence, not a present requirement of residency, as is involved in the instant case. Indeed, the Court, in Soto-Lopez, likened the prior residency requirement to a durational residency requirement, which warrants more careful judicial review, as opposed to a bona fide residency requirement, as is involved here. Id. at 903-04 n.3, 905. Significantly, the New York courts have since upheld another part of the civil service statute which grants a preference to veterans who are residents of New York at the time that the promotional list is established, despite a challenge by nonresidents based on the same grounds as are presented here. Woods v. City of New York, 129 Misc 2d 851 (Sup. Ct., N.Y. Co.,

1985), aff'd, 119 AD2d 469 (1st Dept. 1986), aff'd, 69 NY2d 771 (1987).

Similarly, Shapiro v. Thompson, 394 U.S. 618 (1969), affords plaintiffs no authority for their equal protection challenge (Juris. Statement at 32-34). In Shapiro, this Court struck down statutes which denied welfare benefits to persons who had not been State residents for one year prior to their application for benefits. The Court, however, has long distinguished between prior residency requirements of a given duration, and continuing, bona fide, residency requirements, such as are at issue here.[4] See McCarthy v. Philadelphia Civil Service Commission, supra, 424 U.S. at 647.

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[4] Zobel v. Williams, 457 U.S. 551 (1982), cited by plaintiffs (Juris. Statement at 34-35), is likewise inapposite. There, this Court invalidated an Alaskan statute that discriminated between established and new (Footnote Continued)

Other federal and state courts have upheld bona fide residency laws. In Lorenz v. Logue, 611 F.2d 421 (2d Cir. 1979), the Court of Appeals for the Second Circuit rejected a right to travel and equal protection challenge to a New Haven ordinance, which required that municipal employees hired after January 1, 1978 had to reside within the city limits or relocate there within six months. See also, Simien v. City of San Antonio, 809 F.2d 255 (5th Cir. 1987) (residency requirement not irrational simply because some employees were exempt); Ciechon v. City of Chicago, 634 F.2d 1055, 1059) (7th Cir. 1980) (City has important interest in disciplining employees who violate

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(Footnote Continued)
state residents in the distribution of benefits based solely on their length of state residency. That case involved distinctions between old and new state residents, not between residents and non-residents, and thus has no application here.

residency requirements); Andre v. Board of Trustees, 561 F.2d 48 (7th Cir. 1977), cert. denied, 434 U.S. 1013 (1978) (village ordinance requiring all personnel to establish residency within two years upheld); Mogle v. Sevier County School District, 540 F.2d 478 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977) (school counselor residency requirement upheld); Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 108 Cal. Rptr. 849 (1973), cert. denied, 415 U.S. 935 (1974) (municipal residency requirement rationally promoted legitimate state purposes); Salt Lake City Firefighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239, cert. denied, 395 U.S. 906 (1969) (City residency requirement for officers and employees upheld).

It is true that these cases specifically tested the constitutionality of local or municipal residency laws. But a local

residency requirement is, necessarily, also a requirement of State residency. See Camden, supra, 465 U.S. at 216-17. And while there may be additional rational bases to support a local residency requirement, plaintiffs have failed to demonstrate why a requirement of State residency lacks a rational basis. If the Legislature may constitutionally enact a State residency requirement in the first place, it may continue that State residency for public officers, while relieving some public officers from local residency requirements.

B. The challenged amendments to the Public Officers Law do not abridge the privileges and immunities of citizens.

(1)

Plaintiffs' challenge under the Privileges and Immunities Clause fares no better. Not all forms of discrimination against citizens of other states are constitutionally suspect pursuant to Article IV, Section 2, of the

United States Constitution.[5] Camden, supra, 465 U.S. at 218.

> Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.

Id. at 218. Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 383 (1978) (hereinafter "Baldwin").

This Court has developed a two-step inquiry to determine whether a statute impermissibly contravenes the Privileges and

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[5]Article IV, section 2, clause 1 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Immunities Clause. Camden, supra, 465 U.S. at 218. The first step is to determine whether the benefit denied to nonresidents by the challenged statute is a "fundmanetal right." If nonresidents have no fundamental interest in the benefit, the Privileges and Immunities Clause is inapplicable. Id.; see also, Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 (1985) (hereinafter "Piper"). Under the second step, even if a nonresident's fundamental right is affected by a statute, the statute does not violate the Privileges and Immunities Clause if the difference in treatment between residents and nonresidents is justified by a substantial reason. Camden, supra, 465 U.S. at 222; Supreme Court of Virginia v. Friedman, 487 U.S. ___, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988); Piper, supra, 470 U.S. at 284; see also Toomer v. Witsell, 334 U.S. 385, 396 (1948).

(2)

A nonresident of the State of New York has no fundamental right to serve as a New York City firefighter. In Camden, supra, 465 U.S. 208, plaintiffs, on the basis of the Privileges and Immunities Clause, challenged a municipal ordinance which required that 40% of the employees of contractors and subcontractors working on City construction projects be Camden residents. Holding that out-of-State workers did have a fundamental right to seek private employment across State lines in Camden under the Privileges and Immunities Clause, this Court specifically distinguished public employment, noting that "[p]ublic employment is qualitatively different from employment in the private sector" and that "there is no fundamental right to government employment for purposes of the Equal Protection Clause." 465 U.S. at 219. The Court there

strongly suggests that while private employment is a protected right, public employment is not protected for purposes of the Privileges and Immunities Clause. See also, Associated General Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922, 943, n.43 (9th Cir. 1987).

In Piper, supra, 470 U.S. 274, this Court again indicated that a public officer would be subject to a different analysis under the Privileges and Immunities Clause than the individual who pursues a private "common calling." The Court there held that New Hampshire could not exclude nonresident lawyers from its Bar. The Court reasoned that lawyers, simply by virtue of being lawyers, are not in any sense officials in the government and are not officers of the State in the political sense. Id. at 283, n.15. This Court concluded that "[b]ecause ... a

lawyer is not an 'officer' of the State in any political sense, there is no reason for New Hampshire to exclude from its bar nonresidents." Id. at 283.

There are excellent reasons to distinguish public employment from private employment in the Privileges and Immunities Clause context. The Privileges and Immunities Clause was intended to create a national economic union. Piper, supra, 470 U.S. at 280. That ideal is furthered by the movement of not only goods across state lines, but by that of persons seeking employment in private industry. Public officers, on the other hand, have a close connection with the agencies they serve. See McCarthy v. Philadelphia Civil Service Commission, supra, 424 U.S. at 646 n.6 (1976). They are trained at the expense of State and local taxpayers. They are paid by State and local taxpayers. Their work is

specifically intended to benefit the citizenry of the State and the locality. The clear implication of Piper and Camden is that a public officer does not possess any fundamental right to pursue his calling interstate, for his calling is necessarily related to the agency he serves. This distinction between residents and nonresidents merely reflects the fact that the nation, in addition to being a "national economic union," is composed of individual and sovereign States. See Camden, supra, 465 U.S. at 218; Baldwin, supra, 436 U.S. at 383.

(3)

Even if nonresidents of the State were held to have a fundamental right to serve as public officers in New York City, plaintiffs, in order to make out their claim under the Privileges and Immunities Clause, would have to demonstrate that there is no substantial

reason for the difference in treatment between residents and nonresidents or that the discrimination bears no substantial relationship to the State's objective. Piper, supra, 470 U.S. at 284. There are, however, substantial reasons for the difference in treatment between those living outside the 11 counties but residing in the State and nonresidents and the State residency requirement is substantially related to those purposes.

As is more fully set forth supra, at 27-30, in the discussion of plaintiffs' equal protection claims, the State residency requirement is justified by New York State's interest in promoting among its public officers a sense of identity with, and accountability and commitment to, the State and its communities. The State also has an interest in seeing that its local firefighters, trained in responding to a variety of

emergency situations, will be largely present within the State simply by virtue of their residence in the State. Finally, the State may legitimately seek to ensure that the salaries paid to public officers return an economic benefit to the State, through both spending and taxes. See Camden, supra, 465 U.S. at 221 (fact that Camden is spending its funds may be considered, on remand, in evaluating whether statutory discrimination violates the Privileges and Immunities Clause); see also Hicklin v. Orbeck, 437 U.S. 518, 529 (1978). Therefore, even if plaintiffs could establish that they had a fundamental right to employment as New York City firefighters, New York State is justified in requiring that such public officers be State residents for the reasons stated above.

In sum, for all the foregoing reasons, plaintiffs have demonstrated no constitutional

infirmity in the application of the challenged amendments to them, and no substantial question warranting review by this Court.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED. IF THE JURISDICTIONAL STATEMENT IS TREATED AS A PETITION FOR A WRIT OF CERTIORARI, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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No. 88-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

ERNEST WINKLER, RAYMOND J. ASARO, FRANCES E. BAKER, RALPH N. CAPASSO, DAVID CLEARY, GERARD F. CONDON, LAURANCE CONTI, JAMES CUMMINS, JOHN P. DEVANEY, ROBERT DORRITIE, WILLIAM J. DOVENERO, DAVID P. DRURY, BRUCE W. ERICKSON, MICHAEL FIORILLO, HERBERT C. FISCHER, THOMAS E. FLYNN, MICHAEL P. FRISCH, HENRY W. FUHRMAN, AARON GRABER, FRANK GUSTAR HENKEL, JR., STANLEY D. JESSAMINE, JR., DENNIS KEATING, KIRK A. KOWALCHUK, PETER L. LAUDATI, JOSEPH LIOTTI, PETER P. LORENZO, NEAL M. McKENNA, RICHARD J. MARUCHEAU, ARTHUR MESSINGER, JOHN J. MORAN, WILLIAM R. MURPHY, THOMAS MURRAY, WARREN A. NAGLE, JOHN OEHM, JAMES A. OPALECKY, ANTHONY ORSANO, ROBERT PESCE, KENNETH J. PISCOPO, RICHARD PLOUFF, MICHAEL REHBERG, WILLIAM H. RITCHIE, ROBERT G. SCHILDHORN, C. BENJAMIN STIVALA, ERIK WIENER, FRED C. ZERILLI, and others similarly situated,

Appellants,

vs.

JOSEPH E. SPINNATO, individually and as Commissioner of the Fire Department of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OF STATE OF NEW YORK

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Questions Presented

1. Is a requirement that current public employees who are violating both state and local residency requirements must comply with these requirements within one year, even though current employees who are residents of the state but not the locality may continue to reside outside the locality until they move to new homes, rationally related to legitimate state interests?

2. Is a residency requirement for public employees consistent with the privileges and immunities clauses?[1]

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[1] The caption on the jurisdictional statement does not accurately identify all the parties to the proceeding in the New York Court of Appeals. It omits the State of New York, which participated as an intervenor-defendant in the Supreme Court of the State of New York, Queens County. The State of New York is an intervenor-respondent in this Court.

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No. 88-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OF STATE OF NEW YORK

JURISDICTION

The appropriate method to seek review of the order of the New York Court of Appeals is by petitioning for a writ of certiorari. 28 U.S.C.S. § 1257(a) (Law. Co-op. 1988). Former 28 U.S.C.A. § 1257(2) (West 1966), on which the appellants rely, was amended to delete the avenue of appeal from state court judgments, effective three weeks before the Court of Appeals issued its order.

Statement of the Case

1. A brief history of state and local residency requirements in New York State

For more than a century and a half, New York State has required state and local public officers to be state residents. *See* Rev. Stat. tit. 6, ch. 5, § 1 (1829). For nearly a century, it has required public officers of local governments to be residents of the locality as well as of the State. 1892 N.Y. Laws, ch. 681, §§ 3, 20.

As currently drafted, apart from express statutory exceptions, the Public Officers Law requires all state public officers to be residents of the state and all local public officers to be residents of both the state and locality:

> No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, . . . be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, . . . or within which his official functions are required to be exercised. . . .

N.Y. Pub. Off. Law § 3(1) (McKinney 1988). Under section 30(1)(d) of the Public Officers Law, a public office is deemed to have become vacant as soon as its incumbent ceases to be an inhabitant of New York State or of the political subdivision of which the officer was required to be a resident when chosen. N.Y. Pub. Off. Law § 30(1)(d) (McKinney 1988).

In 1962, the Legislature eased local residency requirements for New York City firefighters and certain other New York officials to permit them to live outside the City in six nearby counties: Orange, Putnam, Rockland, Westchester, Nassau, and Suffolk. 1962 N.Y. Laws, ch. 976, § 1 (codified at N.Y. Pub. Off. Law § 3(9) (McKinney 1988)). Section 30(5) of the Public Officers Law contains a similar exemption. N.Y. Pub. Off. Law § 30(5) (McKinney 1988). All New York City firefighters are informed of these state and local residency requirements when they apply, when they accept employment, and periodically thereafter. RA 14.[2]

After the New York City Fire Department became aware that several firefighters were violating the requirements of sections 3(9) and 30(5) of the Public Officers Law, it took administrative action requiring the firefighters currently violating the law to comply promptly. In April 1986, it issued a series of orders requiring all firefighters who were violating the residency requirements to notify the Inspector General by April 30, 1986, to move into a lawful county by May 30, 1986, and to have their families move into a lawful county by September 1, 1986, unless, "as a result of special circumstances, the member legitimately resides at a domicile different from that of his or her family." Order No. 46, Apr. 11, 1986; Order No. 41, Apr. 2, 1986, RA 15-17.

After the administrative deadline had expired, the Legislature amended sections 3 and 30 by adding subdivision 19 to section 3 and subdivision 5-a to section 30. 1986 N.Y. Laws, ch. 509, §§ 1, 2 (effective July 22, 1986). Under these amendments, effective immediately, all current employees then violating state and local residency requirements by living outside the State had one year to establish residence within the State; all current employees then residing in the State, but residing outside the locality, were permitted to continue to reside outside the locality. Section 3(19) provides:

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[2] "RA " indicates pages in the respondents' appendix in the New York Court of Appeals.

> Any person who resides in this state and who is currently employed as . . . a paid member of the uniformed force of a paid fire department . . . of a city of over one million population, shall be exempt from the provisions of subdivisions one, two and nine of this section upon compliance with the procedure set forth in this subdivision. Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in writing of said intention within thirty days from the effective date of this subdivision and shall specify his then current residence address. The exemption created by this subdivision shall be applicable only to said actual designated residence and not to any residence that any subject currently employed member may thereafter establish; provided, however, that any such currently employed member who resides outside this state shall have one year from the effective date of this subdivision within which to establish residence as required pursuant to subdivisions one, two and nine of this section and comply with the notice requirements of this subdivision. Said residence shall constitute a lawful residence for all purposes notwithstanding any provision to the contrary of any general, special or local law, charter, code, ordinance, resolution, rule or regulation.

N.Y. Pub. Law § 3(19) (McKinney 1988) (effective July 22, 1986). Section 30(5-a) is virtually identical. N.Y Pub. Off. Law § 30(5-a) (McKinney 1988) (effective July 22, 1986).

2. Proceedings below

After the Fire Department issued its April 2 and April 11, 1986 orders requiring firefighters then violating the residence laws to comply, the Supreme Court, New York County granted a temporary stay of reporting obligations until May 30, 1986, and of the requirement to establish residence in the State until June 30, 1986. *See Mancuso v. Spinnato*, No. 9273/86, slip op. at 3 (Sup. Ct. N.Y. Co. May 13, 1986) (Baer, J.). RA33, RA36. The court denied any further relief. RA36.

The appellant firefighters ("plaintiffs") commenced this action against respondents Joseph E. Spinnato, individually and as Commissioner of the Fire Department of the City of New York, Edward I. Koch, individually and as Mayor of the City of New York, the Fire Department of the City of New York, and the City of New York ("City defendants") in a complaint dated November 20, 1986. A82.[3] In their amended complaint, dated May 7, 1987, the named plaintiffs claimed to be either out-of-state residents or employees who claimed to be residents of the state but maintained a residential dwelling outside of the State, which they jointly owned with their wives and were occupied by their families. A127, A129. They contended that the amendments to the Public Officers Law denied them equal protection, due process, the right to travel, and privileges and immunities of citizenship. A135-A148. The State of New York participated as an intervenor-defendant as of right pursuant to section 71 of the New York Executive Law and section 1012 of the Civil Practice Law and Rules to defend the constitutionality of the amendments.

The Supreme Court, Queens County granted the defendants summary judgment and declared sections 3(19) and 30(5-a) of the Public Officers Law constitutional. *Winkler v. Spinnato*, No. 04177/87 (Sup. Ct. Queens Co. July 9, 1987) (decision), 66-a.[4] It concluded that the amendments had a rational basis and were consistent with equal protection because nonresident public employees "could not have the loyalty, sense of accountability, and identity with the state and municipality that resident firemen had and, therefore, could not benefit the people of the state in the same manner" and that resident public officers "would spend their wages here, returning an economic benefit to those whose contributions pay the firemen's salaries." 78-a. It also concluded that the privileges and immunities claim was "without merit" because there was "no fundamental right to serve as a public employee of a particular state." 73-a.

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[3] "A ____" indicates pages in the plaintiffs' appendix in the Court of Appeals.

[4] "____-a" indicates pages in the appendix to the jurisdictional statement.

The Appellate Division, Second Department also concluded that all the plaintiffs' constitutional claims were "without merit" and affirmed the judgment. *Winkler v. Spinnato*, 134 A.D.2d 66, 68, 523 N.Y.S.2d 530, 532 (2d Dep't 1987), 22-a. It concluded that the distinction between residents and nonresidents had a rational basis and was, therefore, consistent with principles of equal protection because a state "may classify employees and the employees of its political subdivisions so as to encourage residence inside the State for any valid reason, including the obvious financial one." *Id.* at 75, 523 N.Y.S.2d at 537, 44-a. It also concluded that the amendments did not violate the privileges and immunities clause because public employment was not a privilege which bore upon the vitality of the nation as a single entity. *Id.* at 78, 523 N.Y.S.2d at 539, 52-a (citing *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 383 (1978)).

The Court of Appeals affirmed. *Winkler v. Spinnato*, 72 N.Y.2d 402, 530 N.E.2d 835, 534 N.Y.S.2d 128 (1988) (per curiam), 1-a. It stated that the amendments had several rational bases. Public employees who reside in New York were likely to benefit the state economically by spending their money in New York and contributing more in taxes than nonresidents. *Id.* at 406, 530 N.E.2d at 837, 534 N.Y.S.2d at 130, 7-a. In addition, "State residency requirements are premised on the belief that out-of-state residents do not have the same loyalty and commitment to the State as in-state residents." *Id.* at 406, 530 N.E.2d at 837, 534 N.Y.S.2d at 130, 7-a. The state could subordinate "its local interest to a limited degree, to accommodate those in violation." *Id.* at 406-07, 530 N.E.2d at 837, 534 N.Y.S.2d at 130, 8-a. Because out-of-state residents were already required to move in order to comply with the state residency requirement, there was

> little reason to excuse them from moving into one of the lawfully designated counties. Because, on the other hand, in-State residents need not otherwise move, they are not being required to do so for the sole purpose of moving into a lawful county. But if they move from their current in-State residence, however, they, like

> out-of-State residents, must do so in compliance with the local residency law.

Id. at 407, 530 N.E.2d at 837-38, 534 N.Y.S.2d at 130, 8-a. Thus, "[t]his limited accommodation to those who already satisfy the State residency requirement and, therefore, do not have to move for that purpose, is rational." *Id.* at 407, 530 N.E.2d at 838, 534 N.Y.S.2d at 130, 8-a-9-a. One judge dissented.

ARGUMENT

POINT I

BECAUSE A NEW YORK STATUTE REQUIRING NONRESIDENT FIREFIGHTERS TO BECOME RESIDENTS OF THE STATE AND LOCALITY IS FULLY CONSISTENT WITH EQUAL PROTECTION AND DUE PROCESS THIS CASE PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR REVIEW BY THIS COURT

New York State's requirement that current nonresident firefighters who have been violating state and local residency requirements comply with both requirements, while excusing current resident firefighters from complying with local residency requirements until they move from their current homes, is consistent with equal protection and due process. State residency requirements further legitimate state interests of limiting participation in the government to members of the community, fostering loyalty, and encouraging migration. Local residency requirements are also rational. Moreover, distinguishing between current resident public employees and current nonresident public employees in awarding benefits — such as the limited amnesty here — is rational. As shown below, the amendments to the Public Officers Law are consistent with these principles. Thus, the plaintiffs neither raise a substantial federal question, assuming that an appeal were available, nor demonstrate that special and important reasons exist warranting review by writ of certiorari.

It is rational for New York to want all of its firefighters — public officers — to live in New York State. It is a basic principle that a state has a legitimate interest "in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.' " *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)). *See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282 n.13 (1985) (recognizing that without certain residency requirements the state would cease to be the separate political community contemplated by the Constitution). Consistent with this principle, as the Court of Appeals recognized, 7-a, state residency requirements further the legitimate state interest of fostering loyalty and a stronger sense of identification with the State among its public officers. In addition, state residency requirements further the legitimate goal of encouraging migration into the state.

It is rational for New York State to permit New York City firefighters to live in six adjoining counties but not in out-of-state counties, even though firefighters in those counties might be closer to New York City. There is no doubt that due process and equal protection permit a state to impose local geographic residency requirements. *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972), *dismissing for want of a substantial federal question*, 385 Mich. 519, 190 N.W.2d 97 (1972). In that case, the Michigan Supreme Court held that a Detroit ordinance requiring police officers to reside in the city was not irrational and did not violate the due process and equal protection clauses. As this Court later declared in *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 646 (1976) (per curiam), "[w]e have therefore held that this kind of ordinance is not irrational." *See also Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) (dismissal for want of a substantial federal question is a decision on the merits). The nonresident plaintiffs fail to mention either case.

It is similarly rational for a state to distinguish between current resident public employees and current nonresident public

employees in awarding benefits such as the limited amnesty here. Under well-settled law, a state may impose a residency requirement, applicable to the time an economic benefit is awarded, to determine who is to receive the benefit. This Court has repeatedly declared that appropriately defined and uniformly applied bona fide residency requirements may be used to determine who is eligible to receive economic benefits, such as appointments to the civil service, *McCarthy*, 424 U.S. at 647; lower tuition, *Martinez v. Bynum*, 461 U.S. 321, 326-29 (1983); welfare, *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969); free medical care, *Memorial Hospital v. Marcicopa County*, 415 U.S. at 255, 267; and hunting licenses, *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978). Indeed, states may even impose such bona fide residency requirements to determine who may exercise the fundamental right to vote. *Dunn v. Blumstein*, 405 U.S. at 343. In approving such requirements this Court has always been careful to distinguish between bona fide residency requirements and durational or retroactive fixed date residency requirements.

This Court has never wavered from this distinction between current and retrospective residency requirements. In *Attorney General of the State of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the plurality opinion recognized that distinctions between current residents and current nonresidents at the time of the award of bonus points for veterans seeking civil service appointments or promotions were constitutional. It was the permanent deprivation of this "significant benefit, based only on the fact of nonresidence at a *past* point in time," which "clearly operate[d] to penalize appellees[] for exercising their rights to migrate." *Id.* at 909 (emphasis supplied).

The Court in Soto-Lopez saw no constitutional objection to limiting the preferences to persons resident at the time of the award:

> Once veterans establish bona fide residence in a State, they "become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State." For as long as New York

> chooses to offer its resident veterans a civil service employment preference, the Constitution requires that it do so without regard to residence at the time of entry into the services.

Id. at 911-12 (footnote and citations omitted) (brackets by Court).

Sections 3(19) and 30(5-a) of the Public Officers Law rationally further legitimate state interests under the principles outlined above. First, since state residency requirements further the legitimate state interest of fostering loyalty and a stronger commitment to the state among its public officers, New York rationally excused its residents who were not residents of the permitted counties and who had relied on non-enforcement, but did not excuse nonresidents who, while they also had relied on non-enforcement, were not sufficiently identified with the State to have loyalty to it.

The rationality of the amendments is further bolstered by the limited nature of the amnesty afforded New York residents. If New York residents who reside outside the permitted counties ever move to new homes, they, like out-of-state residents, must move into the permitted counties. Thus, neither nonresidents nor residents living outside the permitted counties are permitted to move into a non-permitted county. Both classes, therefore, are treated similarly in this respect.

Thus, the amendments are a rational scheme intended to achieve the legitimate goal of ensuring that all New York firefighters are state residents while subordinating its secondary interest of local residency only to the limited extent of permitting state residents who have relied on non-enforcement to remain in their communities so long as they remain in the same house they purchased in reliance on non-enforcement.

Finally, the distinction between current residents who receive the limited amnesty and current nonresidents who do not is permissible because it is based on current residence, not residence at some past time. The challenged sections of the Public Officers Law, enacted only *after* the administrative deadline to

comply with state and local residency requirements had expired and the nonresident plaintiffs failed to comply, impose a bona fide current residency requirement which operates prospectively. All current employees who were violating both state and local residency requirements on the effective date of the amendments and had failed to take advantage of the previous administrative amnesty were granted an additional one year to comply. The express words of these sections, which were effective immediately, 1986 N.Y. Laws, ch. 509, § 2, make it clear that they required current employees then violating long-established residency requirements to comply and did not penalize current employees based on prior violations:

> Any person who *resides* in this state and who is *currently employed* as . . . a paid member of the uniformed force of a paid fire department . . . of a city of over one million population, shall be exempt from the provisions of subdivisions one, two and nine of this section . . . Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in writing of said intention within thirty days from the effective date of this subdivision and shall specify his *then current* residence address. The exemption created by this subdivision shall be applicable only to said actual designated residence and not to any residence that any subject *currently employed* member may thereafter establish; provided, however, that any such *currently employed* member who *resides* outside this state *shall have one year* from the effective date of this subdivision *within which to establish residence* as required pursuant to subdivisions one, two and nine of this section and comply with the notice requirements of this subdivision.

N.Y. Pub. Off. Law § 3(19) (McKinney 1988) (emphasis supplied). Thus, the words of the statute themselves demonstrate that the plaintiffs' contention that the challenged sections deny them the equal protection of the law because these provisions distinguish between residents based on nonresidence at a *past* point in time, jurisdictional statement at 45-46, is without merit.

POINT II

A NEW YORK STATUTE REQUIRING FIREFIGHTERS TO BE RESIDENTS DOES NOT DENY PLAINTIFFS ANY OF THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP AND PRESENTS NEITHER SPECIAL NOR IMPORTANT REASONS MERITING REVIEW

As this Court has made clear, access to public employment is not a privilege or immunity of citizenship protected by article IV, section 2 of the United States Constitution. Since it is not, this Court need not determine whether the amendments are a closely related to the advancement of a substantial state interest. Therefore, the non-resident firefighters' claim under article IV, section 2, resting on private sector cases, is without merit.

Courts must undertake a two-step inquiry when evaluating privilege and immunity claims:

> First, the activity in question must be " 'sufficiently basic to the livelihood of the Nation'. . . as to fall within the purview of the Privileges and Immunities Clause. . . ." For it is " '[o]nly with respect to those "privileges" and "immunities" bearing on the vitality of the Nation as a single entity' that a State must accord residents and nonresidents equal treatment." Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial in-State interest.

Supreme Court of Virginia v. Friedman, 108 S. Ct. 2260, 2264 (1988) (citations omitted).

As this Court has explained, "[p]ublic employment, however, is *qualitatively different* from employment in the private sector; it is a subspecies of the broader opportunity to pursue a

common calling." *United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 219 (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (emphasis supplied)). In the *Camden* case, this Court carefully distinguished *private* employment on a public works project, which was protected by the privileges and immunities clause, from *public*, which was not.[5]

This Court adhered to this distinction in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In that case, this Court distinguished the practice of law by private lawyers from employment as a government official and concluded that the practice of law was a fundamental right for purposes of the privileges and immunities clause. This analysis, as in the *Camden* case, would have been unnecessary had public employment been a privilege or immunity.

[5] Although working for a *private* employer on a public works project was "in a substantial if informal, sense, 'working for the city,' " 465 U.S. at 219, it was not sufficient to "remove the Camden ordinance completely from the purview of the Clause." *Id.* at 221. Such an analysis would have been unnecessary if public employment were a privilege or immunity.

CONCLUSION

For all the foregoing reasons, this Court should dismiss the appeal or, if it determines that the appeal should be deemed to be a petition for a writ of certiorari, it should deny the petition.

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